

3-9-2011

Wilkinson v. State. Dept. of Transp. Clerk's Record Dckt. 38335

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Vol. 1 2

LAW CLERK

IN THE SUPREME COURT OF THE STATE OF IDAHO

REBECCA S. WILKINSON,)

Petitioner/Appellant,)

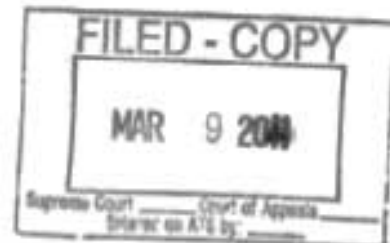
vs.)

STATE OF IDAHO, DEPARTMENT OF)
TRANSPORTATION,)

Respondent.)

Supreme Court No.

38335



RECORD ON APPEAL

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine.

HONORABLE ROBERT J. ELGEE, DISTRICT JUDGE

Brian Elkins
Attorney at Law
P.O. Box 766
Ketchum, Idaho 83340

Plaintiff/Appellant

Timothy J. Stover
Special Deputy Attorney General
P.O. Box 5226
Twin Falls, Idaho 83303-5226

Respondent

ONE VOLUME

38335

COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

REBECCA S. WILKINSON,)	
)	Supreme Court No.
Petitioner/Appellant,)	
)	38335
vs.)	
)	
STATE OF IDAHO, DEPARTMENT OF)	
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2/18/2010	New Case Filed - Other Claims	Robert J. Elgee
	Plaintiff: Wilkinson, Rebecca S Appearance Brian E. Elkins	Robert J. Elgee
	Filing: L3 - Appeal or petition for judicial review or cross appeal or cross-petition from commission, board, or body to district court Paid by: Elkins, Brian E. (attorney for Wilkinson, Rebecca S) Receipt number: 0001120 Dated: 2/18/2010 Amount: \$88.00 (Check) For: Wilkinson, Rebecca S (plaintiff)	Robert J. Elgee
	Petition for Judicial Review	Robert J. Elgee
	Motion for Stay of License Suspension	Robert J. Elgee
	Order Staying License Suspension	Robert J. Elgee
	Hearing Scheduled (Motion to Stay 03/15/2010 09:30 AM) License Suspension	Robert J. Elgee
2/24/2010	Procedural Order governing judicial review of agency action by district court	Robert J. Elgee
2/26/2010	Notice of lodging of Agency Record	Robert J. Elgee
3/2/2010	Notice Of Appearance	Robert J. Elgee
	Defendant: State Of Idaho Department Of Transportation Appearance Timothy J. Stover	Robert J. Elgee
3/3/2010	Petitioners Response to Notice Of Lodging of Agency Record	Robert J. Elgee
	Additional Issue on Judicial Review	Robert J. Elgee
3/4/2010	Notice of Payment of Court Reporters Estimate	Robert J. Elgee
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3/10/2010	Stipulation to maintain order staying license suspension	Robert J. Elgee
3/15/2010	Order maintaining stay on license suspension	Robert J. Elgee
	Hearing result for Motion to Stay held on 03/15/2010 09:30 AM: Hearing Vacated License Suspension	Robert J. Elgee
3/18/2010	Notice of filing transcripts	Robert J. Elgee
	Transcript of December 1, 2009 Filed	Robert J. Elgee
	Transcript of January 26, 2010 Filed	Robert J. Elgee
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	Agency Record	Robert J. Elgee
4/14/2010	Motion to Correct Agency Record	Robert J. Elgee
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4/28/2010	Hearing Scheduled (Clerk's Status 05/27/2010 04:59 PM) petitioner's brief due	Robert J. Elgee
	Hearing Scheduled (Clerk's Status 06/24/2010 04:59 PM) respondent's brief due	Robert J. Elgee
	Continued (Clerk's Status 07/22/2010 04:59 PM) petitioner's reply brief due	Robert J. Elgee
	Hearing Scheduled (Clerk's Status 08/05/2010 04:59 PM) set for oral argument?	Robert J. Elgee
	Petitioners Brief	Robert J. Elgee

Other Claims

Date		Judge
5/26/2010	Respondent's Brief	Robert J. Elgee
6/16/2010	Petitioner's Reply Brief	Robert J. Elgee
6/23/2010	Notice Of Hearing RE: Petition for Judicial Review	Robert J. Elgee
6/24/2010	Hearing Scheduled (Hearing Scheduled 09/13/2010 03:00 PM) petitioners Petition	Robert J. Elgee
9/8/2010	Amended Notice Of Hearing RE: Petition for Judicial Review	Robert J. Elgee
9/10/2010	Continued (Judicial Review 11/01/2010 02:00 PM) petitioners Petition	Robert J. Elgee
11/1/2010	Court Minutes Hearing type: Judicial Review Hearing date: 11/1/2010 Time: 1:57 pm Courtroom: Court reporter: Susan Israel Minutes Clerk: Crystal Rigby Tape Number: Party: Rebecca Wilkinson, Attorney: Brian Elkins Party: State Of Idaho Department Of Transportation, Attorney: Timothy Stover	Robert J. Elgee
	Hearing result for Judicial Review held on 11/01/2010 02:00 PM: District Court Hearing Held Court Reporter: Susan Israel Estimated Number of Transcript Pages for this hearing: petitioners Petition less 100	Robert J. Elgee
11/4/2010	Order on Petition for Judicial Review	Robert J. Elgee
	Civil Disposition entered for: State Of Idaho Department Of Transportation, Defendant; Wilkinson, Rebecca S, Plaintiff. Filing date: 11/4/2010	Robert J. Elgee
	STATUS CHANGED: Closed	Robert J. Elgee
12/3/2010	Notice Of Appeal	Robert J. Elgee
	Appealed To The Supreme Court	Robert J. Elgee
	STATUS CHANGED: Inactive	Robert J. Elgee
12/6/2010	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Elkins, Brian E. (attorney for Wilkinson, Rebecca S) Receipt number: 0007839 Dated: 12/6/2010 Amount: \$101.00 (Check) For: Wilkinson, Rebecca S (plaintiff)	Robert J. Elgee
	Bond Posted - Cash (Receipt 7840 Dated 12/6/2010 for 100.00)	Robert J. Elgee
12/7/2010	Bond Posted - Cash (Receipt 7855 Dated 12/7/2010 for 9.00)	Robert J. Elgee
1/13/2011	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Brian Elkins Receipt number: 0000306 Dated: 1/13/2011 Amount: \$1.00 (Check)	Robert J. Elgee
	Miscellaneous Payment: Copies Of Transcript For Appeals Per Page Paid by: Brian Elkins Receipt number: 0000306 Dated: 1/13/2011 Amount: \$361.25 (Check)	Robert J. Elgee
	Bond Converted (Transaction number 3 dated 1/13/2011 amount 100.00)	Robert J. Elgee
	Bond Converted (Transaction number 4 dated 1/13/2011 amount 9.00)	Robert J. Elgee

Date: 2/28/2011

Time: 08:50 AM

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File Judicial District Court - Blaine County

ROA Report

User: ANDREA

Case: CV-2010-0000123 Current Judge: Robert J. Elgee

Rebecca S Wilkinson vs. State Of Idaho Department Of Transportation

Rebecca S Wilkinson vs. State Of Idaho Department Of Transportation

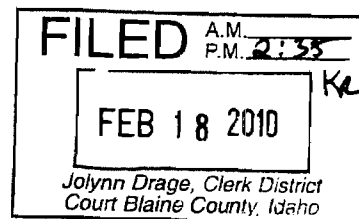
Other Claims

Date		Judge
1/25/2011	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: county warrant Receipt number: 0000536 Dated: 1/25/2011 Amount: \$109.00 (Check)	Robert J. Elgee
2/3/2011	Notice Of Hearing RE: appellants objections to the record on appeal	Robert J. Elgee
	Hearing Scheduled (Objection 02/14/2011 11:30 AM) to record appeal	Robert J. Elgee
	Appellants objections to the record on appeal	Robert J. Elgee
2/14/2011	Hearing result for Objection held on 02/14/2011 11:30 AM: Hearing Vacated to record appeal	Robert J. Elgee
2/24/2011	Stipulation to correct the record on appeal & Order	Robert J. Elgee

2A

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ISB No. 3150

Attorney for Petitioner



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT COURT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

REBECCA S. WILKINSON,)	
	)	Case No. CV-2010- <u>123</u>
Petitioner,)	
v.	)	PETITION FOR JUDICIAL REVIEW
)	
STATE OF IDAHO, DEPARTMENT	)	License/Identification No. FA127022G
OF TRANSPORTATION,	)	ITD File Number: 332000025887
)	
Respondent.	)	Fee Category: L-3 ROBERT J. ELGEE
	)	Fee: \$88.00

The Petitioner, Rebecca Susan Wilkinson, by and through her attorney of record, Brian E. Elkins, petitions this Court for judicial review pursuant to Idaho Code § 67-5270, *et seq.* and I.R.C.P. 84, as follows:

- (1) The name of the agency for whose action judicial review is sought is the State of Idaho, Department of Transportation, Administrative License Suspension Hearing Section (ITD/ALS).
- (2) The District Court to which this petition is taken is the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Blaine since the

Petitioner, Rebecca S. Wilkinson (Wilkinson), resides in Blaine County.

- (3) The action which is the subject of this judicial review is the purported “sustained” Order by the ALS suspending the driving privileges of Wilkinson that were brought pursuant to Idaho Code § 18-8002A (ALS statute) for 90 days, the first 30 days of which are absolute (meaning no driving privileges whatsoever); the ALS proceeding is initiated by the Notice of Suspension for Failure of Evidentiary Testing (NOS Form) served on Wilkinson following her arrest for driving while under the influence of alcohol in violation of Idaho Code § 18-8004 (DUI).
- (4) Wilkinson was arrested for DUI on October 11, 2009 by Officer Garth Davis of the Hailey Police Department. Following her arrest, Wilkinson was transported to the Blaine County Sheriff’s Department where she was asked to submit to a breath test on an Intoxilyzer 5000EN Breath Testing Machine (BrAC) and it was alleged that her breath test results were in excess of Idaho’s legal limit of .08.
- (5) Pursuant to the ALS statute, Officer Davis seized Wilkinson’s Idaho driver’s license, no [REDACTED] and, also consistent with the ALS statute, served on Wilkinson the NOS Form.
- (6) Under the ALS statute, Wilkinson timely requested an administrative hearing before the ITD, ALS Hearing Section, whereupon the matter was set for an ALS hearing before ALS Hearing Officer Eric G. Moody.
- (7) By virtue of the fact that Officer Davis was unavailable for one of the scheduled ALS hearings, the matter was continued until the hearing that took place on December 2, 2009. During the time that the ALS proceeding was continued, ALS Hearing Officer Eric Moody agreed to enter a stay of the suspension of Wilkinson’s driving privileges since, by operation of law under the ALS statute, she would have suffered a suspension 30 days following the service of the NOS Form which would have meant a commencement of her suspension on or about November 10, 2009.

- (8) At the ALS hearings, Wilkinson's counsel submitted a number of exhibits that were admitted into the record, the most notable of which is Petitioner's Exhibit M, a CD-R recording of the proceedings that took place approximately 30 minutes before, and during, the time that Wilkinson submitted to the BrAC test. Following the ALS hearing that was conducted by a telephone conference call on December 2, 2009, Wilkinson asked that the record remain open so that she could be afforded an opportunity to submit a written argument in support of vacating the suspension.
- (9) On December 17, 2009 ALS Hearing Examiner Eric G. Moody issued his Findings of Fact and Conclusions of Law and Order (Decision) ruling that the suspension set out in the NOS Form would be "sustained." A copy of the Decision is attached hereto as Exhibit A and incorporated herein by reference. The heading before the ITD and case caption are set forth on Exhibit A.
- (10) According to the terms of the Decision, the ALS hearing officer quashed the stay order, such that Wilkinson's 90-day ALS suspension would commence on December 28, 2009.
- (11) On December 31, 2009 Wilkinson timely filed a Request for Reconsideration before ALS Hearing Officer Eric G. Moody pursuant to IDAPA 39.02.72.600 and pursuant to Idaho Code § 67-5246(4).
- (12) However, ALS Hearing Officer Eric G. Moody set the matter for another hearing which was held on January 26, 2010 and additional evidence was offered into the record including, but not limited to,
- (a) Officer Garth Davis testified at said hearing.
 - (b) A Stipulation to Suppress BrAC results and State's Motion to Dismiss in the companion criminal case entitled *State of Idaho v. Rebecca S. Wilkinson*, Blaine County Case No. CR-09-2929, where the parties stipulated that the BrAC results obtained from Wilkinson on October 11, 2009 would be suppressed from evidence for failure of the operator, Garth

Davis, to observe and monitor the Defendant during the requisite 15 minutes before she submitted to the BrAC test.

- (c) An Order of Dismissal was entered into the ALS record where the companion DUI case against Wilkinson in Blaine County Case No. CR-09-2929 was dismissed by Blaine County Magistrate R. Ted Israel after finding that Wilkinson's BrAC results "be suppressed from evidence for failure of the arresting officer/operator of the Intoxilyzer 5000 Breath Testing Machine, to properly observe and monitor the Defendant for 15 minutes prior to the time that she submitted to the breath test."
- (13) While the matter was pending before ITD/ALS Hearing Section on Wilkinson's Request for Reconsideration and since her driving privileges became suspended on December 28, 2009, on January 12, 2010 Wilkinson filed with the ALS Hearing Section a Motion for Stay of Suspension of Driving Privileges and on January 14, 2010 ITD issued a "PENDING ACTION" notifying Wilkinson that her ALS suspension was going to be "TEMPORARILY STOPPED: PENDING ADMINISTRATIVE HEARING AND HEARING OFFICER'S DECISION."
- (14) On February 11, 2010, the ALS Hearing Officer issued his Amended Decision sustaining the suspension of Wilkinson's driving privileges under the ALS statute.
- (15) During the hearings on this matter before the ALS hearing officer, oral evidence was offered along with argument in colloquy that were presented to the ALS hearing officer. Those hearings were recorded by ALS. Based upon past experience, counsel for Wilkinson believes and therefor alleges that Hedrick Court Reporting possesses such recordings and that their address is P. O. Box 578, Boise, ID 83701.

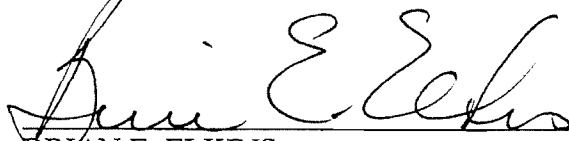
- (16) A Statement of Issues for Judicial Review that Wilkinson intends to assert include, but are not necessarily limited to, the following:
- (a) Did Title 18, Chapter 80, of the Idaho Code, including but not limited to Idaho Code § 18-8002A, provide a basis to sustain the ALS suspension of driving privileges?
 - (b) Pursuant to I. C. § 18-8002A(7), whether the arresting officer, Garth Davis, complied with the requirements of Idaho Code § 18-8004(4) and conducted the BrAC test on Wilkinson in compliance with the standard operating procedures and operator manual for the breath testing device used in this case; to wit: whether Officer Davis complied with the 15-minute observation period and properly monitored and observed Wilkinson prior to the time that she submitted to the BrAC test.
 - (c) Whether Wilkinson's due process rights were violated when Officer Garth Davis would not allow Wilkinson to call her attorney, despite repeated requests to do so, after she submitted to the BrAC test as recognized in *State v. Carr*, 128 Idaho 181. Accordingly, did ALS Hearing Officer Eric G. Moody err when he ruled against Wilkinson on that issue?
 - (d) Was the decision sustaining the ALS in violation of I. C. § 67-5279?
- (17) A transcript of the ALS proceedings is requested.
- (18) By reason of the acts of the Respondent it has been necessary for Wilkinson to retain the services of an attorney. Wilkinson has incurred and will continue to incur costs and attorney's fees. Wilkinson requests Respondent be ordered to pay her reasonable attorney's fees and costs incurred in this action. Should the matter proceed by default, reasonable attorney's fees shall be Three Thousand Dollars (\$3,000). Wilkinson is entitled to an award of attorney's fees and costs under I. C. § 12-117, I.R.C.P. 54(e) and any other applicable rule, statute or case law.

PRAYER FOR RELIEF

WHEREFORE, Petitioner requests the following relief:

- (1) The Court enter an order staying the suspension of the Petitioner's driving privileges and that the order provide that the Petitioner's driving privileges will remain in effect and valid until a decision is issued by the Court on the Petition for Judicial Review.
- (2) That based upon the entire record in this case the Court find that the ITD/ALS order is in violation of statutory provisions, state and federal constitutional provisions, is not supported by substantial evidence in the record as a whole, and that the ALS hearing examiner's decision is arbitrary, capricious or an abuse of discretion.
- (3) The Court set aside the Amended Decision of ALS Hearing Examiner Eric Moody dated February 11, 2010 and that the matter be remanded to ITD/ALS with instructions to vacate the ALS suspension of Wilkinson's driving privileges.
- (4) For an order declaring that the ALS hearing officer erred as a matter of law in his interpretation of Idaho Code §§ 18-8002A, 18-8004(4) and 67-5270, *et seq.*
- (5) For an order finding that the ALS hearing officer acted without a reasonable basis in fact or law in sustaining the ALS suspension and the Decision was arbitrary, capricious, or an abuse of discretion.
- (6) For an award of attorney's fees and costs.
- (5) For an order or judgment granting such other and further relief as the Court deems just and equitable.

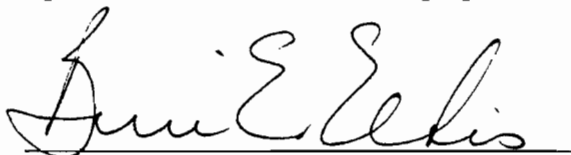
DATED this 18 day of February, 2010.


BRIAN E. ELKINS

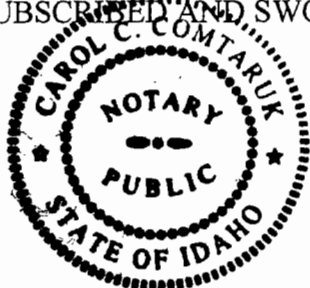
VERIFICATION


STATE OF IDAHO)
) ss.
County of Blaine)

I, BRIAN E. ELKINS, being first duly sworn upon oath, hereby depose and state: I am the attorney for Petitioner, Rebecca S. Wilkinson, in the above-entitled action; that service of the Petition has been made upon the Idaho Transportation Department pursuant to I.R.C.P. 5(f); that the Clerk of the administrative agency will be paid the estimated fee for the preparation of the transcript; that the Clerk of the agency will be paid the estimated fee for the preparation of the record.


BRIAN E. ELKINS

SUBSCRIBED AND SWORN to before me this 18th day of February, 2010.



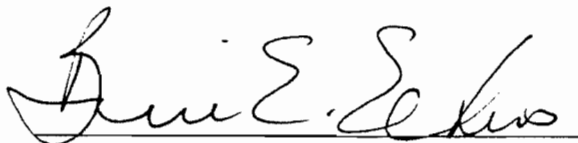

Notary Public for Idaho
Residing at Boise
Commission Expires 3.25.2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of February, 2010 I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

Driver Services/ALS Hearing Section
Idaho Transportation Department
P. O. Box 7129
Boise, Id. 83707-1129

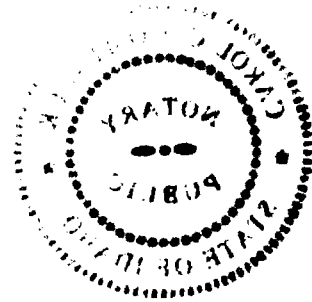
☒ Mailed
☐ Hand-Delivered
☐ Faxed to Fax Number 208.332.7810
☐ Faxed and mailed


BRIAN E. ELKINS

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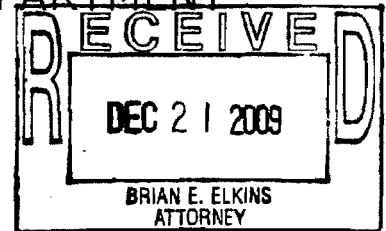
PETITION FOR JUDICIAL REVIEW

- 7



IN THE IDAHO TRANSPORTATION DEPARTMENT

STATE OF IDAHO



IN THE MATTER OF THE) IDAHO D.L. No.FA127022G
DRIVING PRIVILEGES OF) FILE No. 332000025887
)
) **FINDINGS OF FACT AND**
REBECCA SUSAN WILKINSON) **CONCLUSIONS OF LAW AND**
_____) **ORDER**

This matter came on for Administrative License Suspension (ALS) hearing on December 02, 2009, by telephone conference. Brian Elkins, Attorney at Law, represented Wilkinson.

The suspension set out in the Notice of Suspension served pursuant to Idaho Code §18-8002A* is **SUSTAINED**.

EXHIBIT LIST⁺

The hearing examiner received the following exhibits into evidence as part of the record of the proceeding:

1. Notice of suspension and temporary permit
2. Evidentiary test results
3. Sworn statement
4. Copy of petitioner's driver's license
5. Envelope from law enforcement agency
6. Certificate of receipt of law enforcement documents
7. Petitioner's hearing request
8. Petitioner's driving record
9. Response to request for discovery

☒ DICTATION ☐ FILE
☒ COPY ☒ MAILED
TO Bex Wilkinson
ON 12-23-09 BY a

EXHIBIT A

10. Subpoena-duces tecum
11. Subpoena-civil
12. Subpoena-civil
13. Stay order
14. Subpoena-civil
15. Certificate of service
16. Subpoena-civil
17. Certificate of service
18. Subpoena-civil
19. Certificate of service
20. Subpoena-civil
21. Certificate of service

- A. Instrument operations logs
- B. Return of service
- C. DVD
- D. Correspondence
- E. Photo-number 1
- F. Photo-number 2
- G. Photo-number 3
- H. Photo-number 4
- I. Photo-number 5
- J. Bail bond receipt
- K. DVD
- L. Petitioner's written arguments
- M. CD-R
- N. Correspondence

**THE HEARING EXAMINER HAS TAKEN JUDICIAL NOTICE OF THE
FOLLOWING ITEMS:**

1. Records regularly maintained by ITD⁺

2. IDAPA[§] Rules and manuals
3. ISP^{**} standards and procedures⁺⁺ for breath testing instruments
4. Idaho Statutes, city, and county ordinances and procedures
5. Reported Court Decisions
6. NHTSA^{**} driving while impaired and SFSTs^{§§} testing manuals

ADMINISTRATIVE PROCEEDINGS^{*}**

Mr. Elkins' comments and arguments:

1. Wilkinson was not observed in compliance with the ISP Forensic Services SOP Section 3.1.
2. Evidence submitted shows Officer Davis and Wilkinson's location.
3. Exhibit 2 shows the observation period started at 2:26.
4. Exhibit 3 notes a wristwatch was used to time the observation period.
5. The record lacks how the wristwatch's time corresponds to Intoxilyzer 5000 EN's clock.
6. Considering Exhibit 2's 2:26, the fifteen-minute observation period would end at 2:41.
7. Exhibit 2 notes Wilkinson's first subject test was at 2:39.
8. Exhibit 3 provides Wilkinson's breath test results at 2:43.
9. Officer Davis used his wristwatch to establish the 2:43 time.
10. The Intoxilyzer 5000 EN displays two different subject test times.
11. It is suspicious Officer Davis noted one time for Wilkinson's two subject tests.
12. The record shows a non-compliance with the observation period.
13. Wilkinson was not closely observed.

ISSUES RAISED AT HEARING IN ADDITION TO ISSUES SET FORTH IN

IDAHO CODE §18-8002A⁺⁺⁺

1. Was Wilkinson properly monitored prior to her breath test?
2. Was Wilkinson denied access to an attorney?

FINDINGS OF FACT

I, having heard the issues raised by the driver; having considered the exhibits admitted as evidence; having considered the matter herein; and being advised in the premises and the law, make the following Findings of Fact:

PURSUANT TO IDAHO CODE §18-8002A(7) THE PETITIONER HAS THE BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE REGARDING ALL IDAHO CODE §18-8002A STANDARDS AND ALL ISSUES RAISED BY THE PETITIONER.

1.

DID OFFICER GARTH DAVIS HAVE LEGAL CAUSE TO STOP THE VEHICLE WILKINSON WAS DRIVING?

1. Officer Davis observed the vehicle driven by Wilkinson fail to maintain the vehicle's lane of travel by crossing the center and lane divider lines in violation of Idaho Code §§49-630 and 49-637.
2. Officer Davis had legal cause to stop the vehicle driven by Wilkinson.

2.

DID OFFICER DAVIS HAVE LEGAL CAUSE TO BELIEVE WILKINSON VIOLATED IDAHO CODE §18-8004?

1. Officer Davis observed Wilkinson driving a motor vehicle.
2. Wilkinson exhibited the following behaviors:
 - a. Smelled of an alcoholic beverage
 - b. Admitted to consuming alcoholic beverages
 - c. Slurred speech
 - d. Glassy eyes
 - e. Bloodshot eyes

3. Wilkinson met or exceeded the minimum decision points on the following SFSTs:
 - a. The horizontal gaze nystagmus
 - b. The 9-step walk and turn
 - c. The one leg stand
4. Officer Davis had sufficient legal cause to arrest Wilkinson and request an evidentiary test.

3.

DID THE EVIDENTIARY TEST RESULTS INDICATE A VIOLATION OF IDAHO CODE §§18-8004, 18-8004C, OR 18-8006?

1. The analyses of Wilkinson's' breath samples indicated a BrAC^{***} of .165/.151.
2. Wilkinson was in violation of Idaho Code §18-8004.

4.

WAS THE EVIDENTIARY TEST PERFORMED IN COMPLIANCE WITH ALL REQUIREMENTS SET FORTH IN IDAHO CODE AND ISP FORENSIC SERVICES SOPs?

1. Officer Davis' affidavit states Wilkinson's evidentiary breath test was performed in compliance with Idaho Code and ISP Forensic Services SOPs.
2. Wilkinson's evidentiary breath test was performed in compliance with Idaho Code and ISP Forensic Services SOPs.

5.

DID THE EVIDENTIARY TESTING INSTRUMENT FUNCTION PROPERLY WHEN THE TEST WAS ADMINISTERED?

1. The evidentiary testing instrument used to test Wilkinson's breath sample completed a valid simulator solution check at 02:37 hours on October 11, 2009.

2. The valid simulator solution check approved the instrument for evidentiary testing in accordance with ISP Forensic Services SOP.
3. The evidentiary testing instrument functioned properly when the test was administered.

6.

WAS WILKINSON ADVISED OF THE POSSIBLE SUSPENSION OF HER IDAHO DRIVING PRIVILEGE?

1. Wilkinson was played the Idaho Code §§18-8002 and 18-8002A advisory recording prior to submitting to the evidentiary test.
2. Although Wilkinson was interrupted several times when she was being advised of a recording, the DVD reveals an eventual completion of the recording and Officer Davis and Wilkinson reviewing the notice of suspension form prior to Wilkinson submitting to evidentiary testing.
3. Statute and case law only provides a substantial advisement of the notice of suspension form and fails to show a violation occurs when a driver is interrupted during the reading or when the recording of the notice of suspension is being played.
4. Wilkinson was advised of the consequences of refusing or failing evidentiary testing pursuant to Idaho Code §§18-8002 and 18-8002A.

7.

WAS WILKINSON PROPERLY MONITORED PRIOR TO HER BREATH TEST?

1. Wilkinson was monitored prior to her breath test in compliance with ISP Forensic Services SOPs and Idaho Code.
2. It is noted the times in the record for the fifteen-minute observation period do not correspond to each other.
3. However, upon review of the DVD, when Officer Davis and Wilkinson are first observed entering the room up until the time Wilkinson's first subject test, the times shown on the DVD provide fifteen minutes had

elapsed prior to Wilkinson's breath test.

4. Therefore, correlating times from a wristwatch to a breath-testing instrument's clock is an irrelevant issue.
5. ISP Forensic Services SOP Section 3.1 states during *the monitoring period the subject should not be allowed to smoke, drink, eat, or belch/burp*.
6. The SOPs do not mandate the driver should be advised of what is set forth in ISP Forensic Services SOP Section 3.1.
7. Since Officer Davis did not discover any foreign material in Wilkinson's mouth there was no need to restart the fifteen-minute observation period.
8. Case law allows non-certified jail personnel to monitor a driver during the fifteen-minute observation period.
9. Wilkinson failed to submit any proof that the female jailer could not have properly observed Wilkinson and informed Officer Davis of any irregularities occurring when the jailer was patting down Wilkinson.
10. There is an allegation (appears) that Wilkinson had flicked something from her mouth during the observation period but proof by the preponderance of the evidence has not been provided into the record to support this assumption.
11. Wilkinson has provided photos and numerous sequences of times when Officer Davis was not facing Wilkinson during the observation period and the distance where Officer Davis remained during the majority of the observation period.
12. The DVD strongly shows Officer Davis having the capability in using other sensory methods during the observation period that would have detected the possibility of any actions by Wilkinson introducing any foreign matter during the observation period.
13. An opportunity existed at this ALS hearing for Officer Davis to appear by subpoena as permitted by Idaho Code §18-8002A(7).

14. Officer Davis' appearance would clarify, explain, answer questions, and provide input on how he complied with ISP Forensic Services SOPs in monitoring Wilkinson prior to her evidentiary breath test.
15. Even though the subpoena was properly served and a phone number was provided to contact Officer Davis during the ALS hearing, shortly prior to Wilkinson's ALS hearing a request was made in not having Officer Davis appear.
16. Wilkinson attempting to interpret her provided evidence to meet her burden of proof is not sufficient to overcome Officer Davis' standard (boiler point) language provided in Exhibit 3.
17. Furthermore, no local case law has been provided in showing the method used to observe drivers at the Blaine County Jail or Officer Davis violates the fifteen-minute observation period.
18. Upon review of Exhibit 2 Wilkinson's two subject tests differed by 0.014 and were within ISP Forensic Services SOP Sections 3.2 and 3.2.3 requirements.
20. Exhibit 2's BrAC results strongly refute the possibility of an improper fifteen-minute observation period occurred before Wilkinson was administered an evidentiary breath test
21. The record as submitted demonstrates a compliance with ISP Forensic Services SOPs in properly monitoring and observing Wilkinson prior to Wilkinson's evidentiary breath test.

8.

WAS WILKINSON DENIED ACCESS TO AN ATTORNEY?

1. Statute specifically sets forth a driver does not have a right to an attorney prior to any evidentiary testing.
2. The notice of suspension in section 1 had informed Wilkinson of this denial of an attorney prior to evidentiary testing.
3. The DVD also shows Officer Davis explaining to Wilkinson that she does not have a right to an attorney prior to evidentiary testing.

4. Wilkinson has not submitted any proof in showing a request to contact her attorney was made after her evidentiary breath test.
5. Likewise, it reasonable to deduce that Officer Davis or a jailer did offer an opportunity for Wilkinson to call an attorney after Wilkinson's evidentiary breath test.
6. It appears if Wilkinson was able to call a bondsman, Wilkinson had the same chance to call an attorney.
7. Wilkinson failed to meet her burden in showing she was denied access to an attorney after failing an evidentiary breath test.

CONCLUSION OF LAW

CONFLICTING FACTS, IF ANY, WERE CONSIDERED AND REJECTED IN FAVOR OF THE FOREGOING CITED FACTS. BASED UPON THE FOREGOING FINDINGS OF FACT, I CONCLUDE THAT ALL OF THE REQUIREMENTS FOR SUSPENSION OF THE PETITIONER'S DRIVING PRIVILEGES SET FORTH IN IDAHO CODE §§18-8002 AND 18-8002A WERE COMPLIED WITH IN THIS CASE.

THE FOLLOWING ORDER IS RENDERED:

ORDER

THE STAY ORDER IS HEREBY QUASHED AND THE SUSPENSION SET FORTH IN THE NOTICE OF SUSPENSION FOR FAILURE OF EVIDENTIARY TESTING SERVED BY OFFICER DAVIS ON OCTOBER 11, 2009, SHALL BE REINSTATED FOR 90 DAYS COMMENCING ON DECEMBER 28, 2009, AND REMAIN IN EFFECT THROUGH MARCH 28, 2010.

DATED this 17th day of December 2009

A handwritten signature in black ink, appearing to read "Eric G. Moody". The signature is fluid and cursive, with the first name "Eric" and last name "Moody" clearly distinguishable.

Eric G. Moody

ADMINISTRATIVE HEARING EXAMINER

Endnotes

* Idaho's Implied Consent Statute

† Idaho Transportation Department's (ITD hereafter) exhibits are numeric, Petitioner's exhibits are alpha

† Idaho Transportation Department

§ Idaho's Administrative Procedure Act

** Idaho State Police

†† Hereafter SOPs

†† National Highway Transportation Safety Administration

§§ Standardized field sobriety tests

*** Argument and testimony is summarized from record of hearing

††† Issues addressed under Idaho Code §18-8002A(7) will not be repeated under Petitioner's issues

††† Breath Alcohol Concentration

FINAL ORDER

(Hearings pursuant to section 18-8002A, I.C.)

This is a final order of the Department.

A motion for reconsideration may be filed with the Idaho Transportation Department's Administrative License Suspension Hearing Unit, PO Box 7129, Boise, ID 83707-1129 within fourteen (14) days of the issue date of this order. If the hearing officer fails to act upon this motion within twenty-one (21) days of its receipt, the motion will be deemed denied.

Or, pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition for judicial review in the district court of the county in which:

1. A hearing was held;
2. The final agency actions were taken; or
3. The party seeking review of the order resides.

An appeal must be filed within twenty-eight (28) days of the issue date of this final order. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

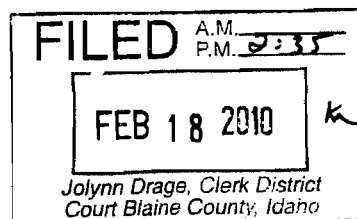
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 18th day of December 2009, I mailed a true and accurate copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER by depositing the same in the United States mail, postage prepaid, addressed to:

Brian E. Elkins
Attorney at Law
PO Box 766
Ketchum, Idaho 83340

Michael P. [Signature]

BRIAN E. ELKINS, P.C.
 Attorney at Law
 208 Spruce Avenue North
 P. O. Box 766
 Ketchum, Idaho 83340
 Telephone (208) 726-4338
 Facsimile (208) 726-9328
 E-mail: beelkins@cox.net
 ISB No. 3150



Attorney for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT COURT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

REBECCA S. WILKINSON,)	
	)	Case No. CV-2010- <u>123</u>
Petitioner,)	
	)	MOTION FOR STAY OF
v.	)	LICENSE SUSPENSION
)	
STATE OF IDAHO, DEPARTMENT)	
OF TRANSPORTATION,)	
)	
Respondent.)	
_____)	

The Petitioner, Rebecca S. Wilkinson, by and through her attorney of record, Brian E. Elkins, moves this Court pursuant to I.R.C.P. 84(m) for an order directing that the Idaho Transportation Department continue the stay that is currently in place on the suspension of the Petitioner's driving privileges that are authorized under Idaho Code § 18-8002A(4)(a)(i). This motion is based upon the fact that the Petitioner has a meritorious claim for overturning the administrative agency's decision which upheld the suspension of the Petitioner's driving privileges even though the prosecutor, in the companion criminal case, conceded and stipulated that the arresting officer did not comply with the requirements of the Standard Operating

Procedures, or the Manual for the Intoxilyzer 5000 by failing to closely monitor and observe the Petitioner 15 minutes prior to the time that she submitted to the breath test. Based on that stipulation, Blaine County Magistrate Judge R. Ted Israel dismissed the companion DUI case.

On two separate occasions the Idaho Transportation Department, while the administrative license suspension case was pending, issued stay orders, staying the suspension of the Petitioner's driving privileges that go into effect by operation of law under Idaho Code § 18-8002A. Attached hereto as Exhibit A is the first "PENDING ACTION" dated November 5, 2009 and the second one, attached hereto as Exhibit B, is dated January 14, 2010 which was issued following the ALS Hearing Officer's Decision sustaining the suspension of the Petitioner's driving privileges.

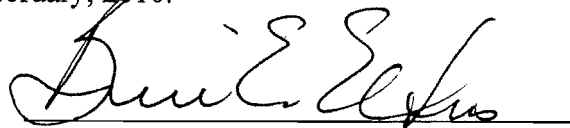
If a stay is not entered, the Petitioner's driving privileges will become suspended on February 25, 2010, and she will suffer extreme hardship through the loss of driving privileges. Furthermore, Petitioner will suffer irreparable damage if the ALS suspension is imposed as the controversy will most likely become moot after Wilkinson will have completely served her ALS suspension.

This motion is based upon the entire record in this matter and such applicable provisions of the Idaho Administrative Procedures Act and IDAPA, statutes and Rules of Civil Procedure.

Wilkinson agrees that this matter can be set for a hearing in 14 days so that counsel for ITD can be heard on whether a stay should remain in effect.

Oral argument is respectfully requested.

DATED this 18 day of February, 2010.

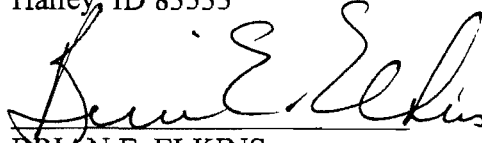

BRIAN E. ELKINS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19 day of February, 2010, I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

☒ Mailed
☐ Hand-Delivered
☐ Faxed to 208-332-7810
☐ Faxed and mailed

Driver Services/ALS Hearing Section
Idaho Transportation Department
P. O. Box 7129
Boise, ID 83707-1129
Hailey, ID 83333


BRIAN E. ELKINS

crim\wilkinson-suspen-stay.mot

**IDAHO TRANSPORTATION DEPARTMENT**

Driver Services • P.O. Box 7129
Boise ID 83707-1129

10025
(208) 334-8735
dmv.idaho.gov

PHONE: (208) 334-8736

WILKINSON, REBECCA SUSAN

NOVEMBER 05, 2009

BOX 4976
KETCHUM

ID 83340

LIC/IDENT NO: [REDACTED]
FILE NUMBER: 332000025887
DATE OF BIRTH: [REDACTED]

PENDING ACTION

THIS IS TO NOTIFY YOU THAT EFFECTIVE 12:01 A.M. NOVEMBER 05, 2009 ,
THE WITHDRAWAL PERIOD FOR:
ADMIN LIC SUSP BAC .08+/DRUGS/INTOX SUBS I.C. 18-8002A

IS TEMPORARILY STOPPED:
PENDING ADMINISTRATIVE HEARING AND HEARING OFFICERS DECISION

YOUR CLASS D DRIVING PRIVILEGES ARE CLEAR UNLESS OTHERWISE NOTIFIED.
THE ORIGINAL WITHDRAWAL DATES ARE NO LONGER VALID. IN THE EVENT THE
WITHDRAWAL IS RE-ENFORCED, CORRECTED DATES WILL BE ISSUED WITH CREDIT
GIVEN FOR ANY TIME SPENT UNDER WITHDRAWAL.

LICENSE ENCLOSED

COPY

IN THE IDAHO TRANSPORTATION DEPARTMENT

STATE OF IDAHO

In the Matter of the	)	D.L. No. FA127022G
Driving Privileges of	)	FILE No. 332000025887
	)	STAY
WILKINSON, REBECCA SUSAN	)	ORDER
_____)	

Pursuant to Title 67, Idaho Code, and IDAPA rule 04.11.01 the Idaho Transportation Department is hereby ordered to stay WILKINSON, REBECCA SUSAN §18-8002A suspension effective the 5th day of November 2009. The suspension shall be stayed indefinitely pending the written Findings of Fact and Conclusions of Law and Order.

This stay shall not set precedent for stays in future Administrative License Suspension Hearings.

DATED, this 5th day of November 2009.

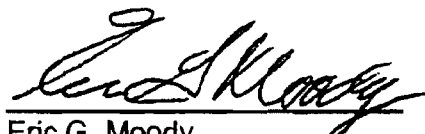

Eric G. Moody
Hearing Examiner

EXHIBIT A-2

**IDAHO TRANSPORTATION DEPARTMENT**

Driver Services • P.O. Box 7129

Boise ID 83707-1129

18035
(208) 334-8735
dmv.idaho.gov

PHONE: (208) 334-8736

WILKINSON, REBECCA SUSAN

JANUARY 14, 2010

BOX 4976

KETCHUM

ID 83340

LIC/IDENT NO: [REDACTED]

FILE NUMBER: 332000025887

DATE OF BIRTH: [REDACTED]

PENDING ACTION

THIS IS TO NOTIFY YOU THAT EFFECTIVE 10:04 A.M. JANUARY 14, 2010 ,
THE WITHDRAWAL PERIOD FOR:
ADMIN LIC SUSP BAC .08+/DRUGS/INTOX SUBS I.C. 18-8002A

IS TEMPORARILY STOPPED:

PENDING ADMINISTRATIVE HEARING AND HEARING OFFICERS DECISION

YOUR CLASS D DRIVING PRIVILEGES ARE CLEAR UNLESS OTHERWISE NOTIFIED.
THE ORIGINAL WITHDRAWAL DATES ARE NO LONGER VALID. IN THE EVENT THE
WITHDRAWAL IS RE-ENFORCED, CORRECTED DATES WILL BE ISSUED WITH CREDIT
GIVEN FOR ANY TIME SPENT UNDER WITHDRAWAL.

☐ DICTATION ☐ FILE
☒ COPY ☐ MAILED

TO BexON 1/14/2010 BY BE via fax 726-8383**COPY****EXHIBIT 8**

FILED A.M. 3:15 P.M. 3:15
FEB 18 2010
Jolynn Drage, Clerk District
Court Blaine County, Idaho

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT COURT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

REBECCA S. WILKINSON,)	
	)	Case No. CV-2010- <u>123</u>
Petitioner,)	
v.	)	ORDER STAYING
	)	LICENSE SUSPENSION
STATE OF IDAHO, DEPARTMENT)	
OF TRANSPORTATION,)	
)	
Respondent.)	
_____)	

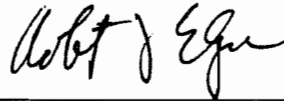
TO: THE IDAHO TRANSPORTATION DEPARTMENT

The Petitioner's Motion for Order Staying License Suspension came before this Court on the 17 day of February, 2010 with the Petitioner being represented by her attorney of record, Brian E. Elkins. Based upon the record in this matter and the fact that a Petition for Judicial Review was filed concurrently with the Petitioner's request for the entry of an order staying the suspension of her driving privileges, pursuant to Idaho Code § 67-5274 and Rule 83(m) of the Idaho Rules of Civil Procedure, to maintain the status quo and good cause otherwise appearing since there were stay orders previously entered by the Idaho Transportation Department - ALS Hearing Section,

The Idaho Transportation Department IS HEREBY ORDERED TO STAY Rebecca Susan Wilkinson's I. C. § 18-8002A driver's license suspension effective immediately until further order of the Court. The Petitioner's Driver's License Number is [REDACTED] and the ITD File Number is 332000025887.

This matter shall be set for a hearing on March 15, 2010, at 9:30 a.m. to provide counsel for the Idaho Transportation Department an opportunity to be heard on whether the stay remains in effect.

DATED this 18 day of February, 2010.



ROBERT J. ELGEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18 day of February, 2010, I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

☒ Mailed
☐ Hand-Delivered
☐ Faxed to 208-332-7810
☐ Faxed and mailed

☐ Mailed
☒ Hand-Delivered
☐ Faxed to Fax Number

Driver Services/ALS Hearing Section
Idaho Transportation Department
P. O. Box 7129
Boise, ID 83707-1129
Hailey, ID 83333

Brian E. Elkins
Attorney at Law
P. O. Box 766
Ketchum, ID 83340


CLERK OF THE COURT

crim\wilkinson-suspen-stay.ord

FILED
A.M.
P.M.
FEB 24 2010
Jolynn Drage, Clerk District
Court Blaine County, Idaho

Respondent.

PROCEDURAL ORDER GOVERNING JUDICIAL REVIEW OF AGENCY ACTION BY DISTRICT COURT

4. Preparation of Agency Record; Payment of Fees: Pursuant to *I.R.C.P.* 84(f), when the statute provides what shall be contained in the official record of the agency upon judicial review, the agency shall prepare the record as provided by statute.

32

Otherwise, the documents listed in paragraph (3) of *I.R.C.P.* Rule 84(f) shall constitute the agency record for review. Petitioner shall pay all fees as required for preparation of the agency record in accordance with *I.R.C.P.* Rule 84(e)(4). The clerk of the agency in accordance with *I.R.C.P.* Rule 84(e)(5) shall lodge the record with the agency within 14 days of the filing of the Petition for Judicial Review. Any extension sought for preparation of the agency record shall be made by the agency to the district court.

5. Preparation of Transcript, Payment of Fee: The Court requires the provision of a written transcript prepared from the recorded or reported proceedings. It is the responsibility of the Petitioner (or Cross-Petitioner, as the case may be) to timely arrange and pay for preparation of all portions of the transcript reasonably necessary for review. Pursuant to *I.R.C.P.* 84(g), the responsible party shall contact the agency clerk to determine the estimated cost of the transcript, and pay the estimated cost in accordance with *I.R.C.P.* 84(g)(1)(A) or (2)(A) as the case may be. The transcript shall be lodged with the agency within 14 days of the filing of the petition for judicial review in accordance with *I.R.C.P.* 84(g)(1)(B), (C) or 84(g)(2)(B)(C) as the case may be. The transcriber may apply to the district court for an extension of time, for good cause shown.

6. Settlement of Transcript and Record. Pursuant to *I.R.C.P.* 84(j), and unless otherwise provided by statute, upon receipt of the transcript and upon completion of the record, the agency shall mail or deliver Notice of Lodging of Transcript and Record to all attorneys of record or parties appearing in person and to the district court. The parties shall have 14 days from the date of mailing of the notice to pick up a copy of the transcript and agency record and to object to the transcript or record. All fees for the preparation of the transcript and record shall be paid by the responsible party at or before the pick up of the agency record and transcript. Any objection to the record shall be determined by the agency within 14 days of receipt of the objection and the agency decision on the objection shall be included in the record on petition for review. Upon the failure of the party to object within 14 days, the transcript and record shall be deemed settled. Pursuant to *I.R.C.P.* 84(k), the settled record and transcript shall be lodged with the district court within 42 days of the service of the Petition for Judicial Review.

7. Augmentation of Record- Additional Evidence Presented to District Court- Remand to Agency to Take Additional Evidence: Pursuant to *I.R.C.P.* 84(l) the agency record and/or transcript on review may be augmented upon motion by a party within 21 days of the filing of the settled transcript and record in the manner prescribed by *I.A.R.* 30. The taking of additional evidence by the district court and/or agency on remand shall be governed by statute or *I.R.C.P.* 84(l).

8. Briefs: The petitioner's brief shall be filed with the clerk within 35 days after lodging of the transcript and record. The respondent's brief (cross-petitioner's brief) shall be filed within 28 days after service of petitioner's brief. The petitioner may file a reply brief within 21 days after service of respondent's brief. The organization and content of briefs shall be governed by *I.A.R.* 35 and 36. Pursuant to *I.R.C.P.* 84(p) only one (1) original signed brief may be filed with the court; however, an additional copy of any brief will be plainly marked "Judge's copy" and will be provided for use by the

court, mailed or delivered to the judge in chambers. Copies of all briefs shall be served on all parties.

9. **Extensions of Time:** Motions to extend the time for filing a brief shall be submitted in conformity with *I.A.R.* 34(e). All other requests for extension of time shall be submitted in conformity with *I.A.R.* 46.

10. **Motions:** All motions shall be submitted in conformity with *I.R.C.P.* 84(o) and shall be heard with out oral argument unless ordered by the Court.

11. **Oral Argument:** After all briefs have been filed, either party may set the matter for oral argument pursuant to *I.R.C.P.* 84(q). If neither party notices the matter for oral argument within 14 days of the filing of the last brief (or the time for filing briefs has expired) the Court will deem oral argument waived and the matter will be decided on the record, transcript and briefs. If the matter is set for oral argument, the form and order of argument shall be governed by *I.A.R.* 37.

it is the responsibility of both counsel to advise the court the matter is submitted for decision.
11/9

12. **Judgment or Decision.** The Court's decision will be by written memorandum which shall constitute the Judgment or Decision required by *I.R.C.P.* 84(t)(1).

13. **Attorneys Fees and Costs on Appeal:** Costs and attorneys fees on judicial review shall be claimed, objected to and fixed in accordance with *I.A.R.* 40 and 41, provided that only one original signed claim, objection or supporting or opposing affidavit need be filed.

14. **Remittitur:** If no notice of appeal to the Idaho Supreme Court is filed within forty-two (42) days after filing of the Court's written decision, the clerk shall issue a *remittitur* remanding the matter to the agency as provided in *I.R.C.P.* 84(t)(4).

15. **Failure to Comply:** Failure by either party to timely comply with the requirement of this Order or provisions of the *Idaho Rules of Civil Procedure* or *Idaho Appellate Rules*, if applicable, shall be grounds for imposition of sanctions, including, but not limited to the allowance of attorneys fees, striking of briefs or dismissal of the appeal pursuant to *I.R.C.P.* 11 and 84(n) and *I.A.R.* 11.1 and 21.

DATED this 23 day of Feb May, 2010.



District Judge

CERTIFICATE OF SERVICE

I, undersigned, hereby certify that on the 24 day of February, 20 , I caused to be served a true and correct copy of the foregoing, by the method indicated below, and addressed to the following:

Brian E. Elkins
PO Box 766
Ketchum, ID 83340

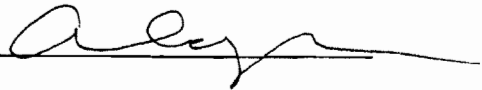
☒ U.S. Mail
☐ Hand delivered
☐ Faxed
☐ Court Folder

Driver Services/ ALS Hearing Section
Idaho Transportation Department
PO Box 7129
Boise, ID 83707-1129

☒ U.S. Mail
☐ Hand delivered
☐ Faxed
☐ Court Folder

CLERK OF THE COURT

By: _____



FILED *0250*
FEB 26 2010
Jolynn Drage, Clerk District
Court Blaine County, Idaho

REBECCA SUSAN WILKINSON,

Petitioner,

v.

State of Idaho,
Department of Transportation

Respondent.

NOTICE OF LODGING OF AGENCY RECORD

36

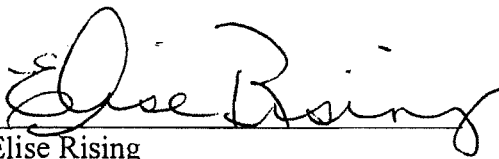
Evidentiary Test Results – <i>STATE’S EXHIBIT 2</i>	3
Sworn Statement – <i>STATE’S EXHIBIT 3</i>	4-6
Copy of Petitioner’s Driver License – <i>STATE’S EXHIBIT 4</i>	7
Envelope from Law Enforcement Agency – <i>STATE’S EXHIBIT 5</i>	8
Certification of Receipt of Law Enforcement Documents – <i>STATE’S EXHIBIT 6</i>	9
Petitioner’s Request for Hearing – <i>STATE’S EXHIBIT 7</i>	10-18
Petitioner’s Driver License Record – <i>STATE’S EXHIBIT 8</i>	19-20
Response to Request for Discovery – <i>STATE’S EXHIBIT 9</i>	21
Subpoena – Duces Tecum – <i>STATE’S EXHIBIT 10</i>	22
Subpoena – Civil – <i>STATE’S EXHIBIT 11</i>	23
Subpoena - Civil – <i>STATE’S EXHIBIT 12</i>	24
Order – Stay – <i>STATE’S EXHIBIT 13</i>	25
Subpoena – Civil – <i>STATE’S EXHIBIT 14</i>	26
Certificate of Service – <i>STATE’S EXHIBIT 15</i>	27
Subpoena – Civil – <i>STATE’S EXHIBIT 16</i>	28
Certificate of Service – <i>STATE’S EXHIBIT 17</i>	29
Subpoena – Civil – <i>STATE’S EXHIBIT 18</i>	30
Certificate of Service – <i>STATE’S EXHIBIT 19</i>	31
Subpoena – Civil – <i>STATE’S EXHIBIT 20</i>	32
Certificate of Service – <i>STATE’S EXHIBIT 21</i>	33
Order – Stay – <i>STATE’S EXHIBIT 22</i>	34
Findings of Fact and Conclusions of Law and Order – <i>STATE’S EXHIBIT 23</i>	35-47
Instrument Operations Log – <i>PETITIONER’S EXHIBIT A</i>	48-50
Return of Service of Subpoena Duces Tecum – <i>PETITIONER’S EXHIBIT B</i>	51-58
CD – Unable to Play or Copy CD – <i>PETITIONER’S EXHIBIT C</i>	
Correspondence – <i>PETITIONER’S EXHIBIT D</i>	59-60
Photo – <i>PETITIONER’S EXHIBIT E</i>	61
Photo – <i>PETITIONER’S EXHIBIT F</i>	62
Photo – <i>PETITIONER’S EXHIBIT G</i>	63
Photo – <i>PETITIONER’S EXHIBIT H</i>	64
Photo – <i>PETITIONER’S EXHIBIT I</i>	65
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CD-R – Able to Copy and Play – <i>PETITIONER’S EXHIBIT M</i>	
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Supplement to Petitioner’s Request for Reconsideration – <i>PETITIONER’S EXHIBIT P</i>	87-90
Stipulation to Suppress BAC Results and State’s Motion to Dismiss – <i>PETITIONER’S EXHIBIT Q</i>	91-92
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Subpoena – Civil – <i>PETITIONER’S EXHIBIT S</i>	95
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Petition for Judicial Review
Correspondence

140-168
169

As of this DATE, February 25, 2010, a Transcript has [X], has not [] been requested by the petitioner or his attorney.

DATED this 25th day of February, 2010.


Elise Rising
Idaho Transportation Department

CERTIFICATE OF SERVICE

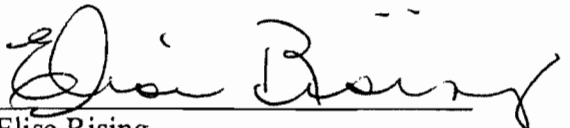
I hereby certify that on this 25th day of February, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

BRIAN E. ELKINS
ATTORNEY AT LAW
PO BOX 766
KETCHUM, ID 83340

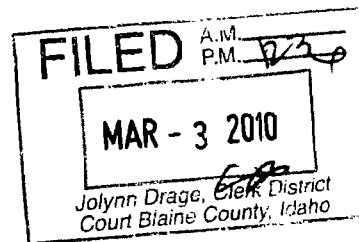
X U.S. MAIL
 HAND DELIVERED
 OVERNIGHT MAIL
 TELECOPY (FAX)

TIMOTHY J. STOVER
ATTORNEY AT LAW

X ELECTRONIC MAIL
 HAND DELIVERED
 OVERNIGHT MAIL
 TELECOPY (FAX)


Elise Rising
Idaho Transportation Department

BRIAN E. ELKINS, P.C.
 Attorney at Law
 208 Spruce Avenue North
 P. O. Box 766
 Ketchum, Idaho 83340
 Telephone (208) 726-4338
 Facsimile (208) 726-9328
 E-mail: beelkins@cox.net
 ISB No. 3150



Attorney for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT COURT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

REBECCA S. WILKINSON,)	
	)	Case No. CV-10-123
Petitioner,)	
v.	)	PETITIONER'S RESPONSE
	)	TO NOTICE OF LODGING
STATE OF IDAHO, DEPARTMENT	)	OF AGENCY RECORD
OF TRANSPORTATION,)	
)	
Respondent.)	
)	

The Petitioner, Rebecca Susan Wilkinson, by and through her attorney of record, Brian E. Elkins, responds to the ITD/ALS Notice of Lodging of Agency Record, dated February 25, 2010, as follows:

- (1) Petitioner reserves the right to make further objections to the record upon receipt and review. The Petitioner has not been able to review the record prepared by ITD/ALS but the notice indicates that the "parties may pick up a copy of the record between the hours of 8:00 a.m. and 5:00 p.m. at the Idaho Transportation Department, 3311 W. State Street, Boise, ID 83703." It is not practical for the

Petitioner to make arrangements to either drive to Boise from Ketchum to pick up the record or make arrangements with a courier to transport the record.

- (2) Based upon a review of the exhibits, it does not appear that the agency included a copy of the Petitioner's Motion for Stay of Suspension of Driving Privileges, dated January 12, 2010.
- (3) The Findings of Fact and Conclusions of Law and Order, page nos. 125-139, should be properly named as "Amended Findings of Fact and Conclusion of Law and Order.
- (4) It does not appear that the record includes a Stay Order dated January 14, 2010.
- DATED this 2 day of March, 2010.


BRIAN E. ELKINS

CERTIFICATE OF SERVICE

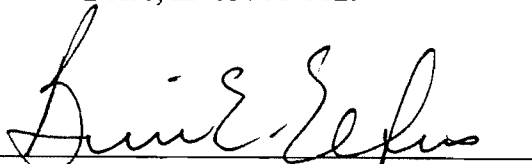
I HEREBY CERTIFY that on the 2 day of March, 2010 I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

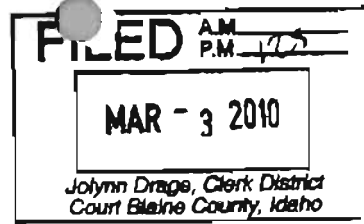
☒ Mailed
☐ Hand-Delivered
☐ Faxed to 208-736-9929
☐ Faxed and mailed

Timothy J. Stover
Special Deputy Attorney General
Idaho Transportation Department
P. O. Box 5226
Twin Falls, ID 83303-5226

☒ Mailed
☐ Hand-Delivered
☐ Faxed to 208-332-2002
☐ Faxed and mailed

Elise Rising
Administrative Assistant, Driver Services
Idaho Transportation Department
P. O. Box 7129
Boise, ID 83701-1129


BRIAN E. ELKINS



ORIGINAL IN RED

BRIAN E. ELKINS, P.C.
Attorney at Law
208 Spruce Avenue North
P. O. Box 766
Ketchum, Idaho 83340
Telephone (208) 726-4338
Facsimile (208) 726-9328
E-mail: beelkins@cox.net
ISB No. 3150

Attorney for Petitioner


IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT COURT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

REBECCA S. WILKINSON,)	
	)	Case No. CV-10-123
Petitioner,)	
v.	)	ADDITIONAL ISSUE
	)	ON JUDICIAL REVIEW
STATE OF IDAHO, DEPARTMENT)	
OF TRANSPORTATION,)	
)	
Respondent.)	
_____)	

The Petitioner, Rebecca Susan Wilkinson, by and through her attorney of record, Brian E. Elkins, pursuant to I.R.C.P. 84(d)(5), provides an additional issue to be raised on judicial review:

- (1) Whether the Magistrate's findings in the Order of Dismissal that the Petitioner/Defendant's breath test results for alcohol concentration be suppressed from evidence for failure of the arresting officer/operator of the Intoxilyzer 5000EN Breath Testing Machine to properly observe and monitor the Defendant for 15 minutes prior to the time that she submitted to the test is *res judicata* and/or the doctrine of collateral estoppel should apply in this proceeding.

DATED this 2 day of March, 2010.


BRIAN E. ELKINS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2 day of March, 2010 I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

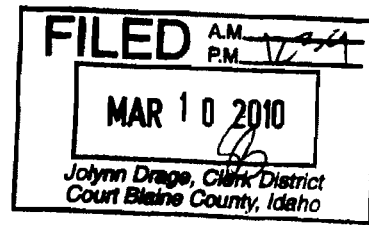
<input checked="" type="checkbox"/> Mailed	Timothy J. Stover
<input type="checkbox"/> Hand-Delivered	Special Deputy Attorney General
<input type="checkbox"/> Faxed to 208-736-9929	Idaho Transportation Department
<input type="checkbox"/> Faxed and mailed	P. O. Box 5226
	Twin Falls, ID 83303-5226


BRIAN E. ELKINS

crim\wilkinson-JudRev-Add'l-issue.isu

BRIAN E. ELKINS, P.C.
Attorney at Law
208 Spruce Avenue North
P. O. Box 766
Ketchum, Idaho 83340
Telephone (208) 726-4338
Facsimile (208) 726-9328
E-mail: beelkins@cox.net
ISB No. 3150

Attorney for Petitioner



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT COURT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

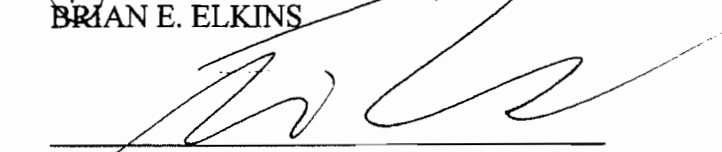
REBECCA S. WILKINSON,)	
	)	Case No. CV-10-123
Petitioner,)	
v.	)	STIPULATION TO MAINTAIN ORDER
	)	STAYING LICENSE SUSPENSION
STATE OF IDAHO, DEPARTMENT)	
OF TRANSPORTATION,)	
)	
Respondent.)	
_____)	

The Petitioner, Rebecca Susan Wilkinson, by and through her attorney, Brian E. Elkins, hereby stipulates and agrees with Timothy J. Stover, Special Deputy Attorney General for the Respondent, that the Order Staying License Suspension filed in this matter on February 18, 2010 shall stay in effect during the pendency of this matter during judicial review or until further order of the Court.

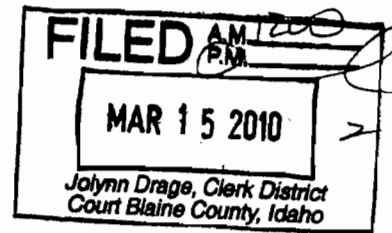
Accordingly, the parties agree that the status hearing set for March 15, 2010 at 9:30 a.m., where the Respondent was to be given an opportunity to be heard on whether the stay should stay in effect, can be vacated.

DATED this 8 day of March, 2010.


BRIAN E. ELKINS


TIMOTHY J. STOVER

crim\wilkinson-JudRev-Stay-DLsus.stp



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT COURT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

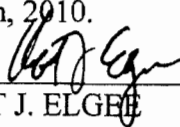
REBECCA S. WILKINSON,)	
	)	Case No. CV-10-123
Petitioner,)	
v.	)	ORDER MAINTAINING STAY
	)	ON LICENSE SUSPENSION
STATE OF IDAHO, DEPARTMENT)	
OF TRANSPORTATION,)	
)	
Respondent.)	
_____)	

The Stipulation to Maintain Order Staying License Suspension came before this Court the 10 day of March, 2010, in chambers, without the parties being present. Based upon the Stipulation to Maintain Order Staying License Suspension and good cause otherwise appearing therefor;

IT IS HEREBY ORDERED that the original Order Staying License Suspension filed in this matter on February 18, 2010 shall remain in effect and the Idaho Department of Transportation is ordered to STAY the suspension of Rebecca Susan Wilkinson's driver's license during the pendency of this matter or until further order of the Court.

IT IS FURTHER ORDERED that the status hearing set for March 15, 2010, at 9:30 a.m. shall be vacated.

DATED this 13 day of March, 2010.



ROBERT J. ELGER
District Judge

CERTIFICATE OF SERVICE

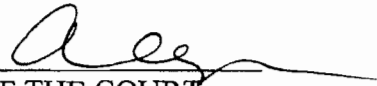
I HEREBY CERTIFY that on the 15 day of March, 2010, I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

☒ Mailed
☐ Hand-Delivered
☐ Faxed to Fax Number

Brian E. Elkins
Attorney at Law
P. O. Box 766
Ketchum, ID 83340

☒ Mailed
☐ Hand-Delivered
☐ Faxed to 208-736-9929
☐ Faxed and mailed

Timothy J. Stover
Special Deputy Attorney General
Idaho Transportation Department
P. O. Box 5226
Twin Falls, ID 83303-5226

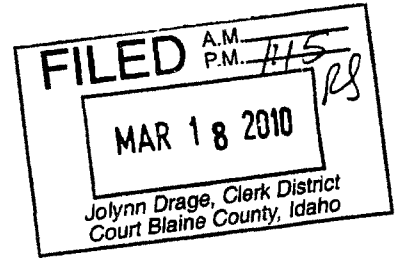


CLERK OF THE COURT

crim\wilkinson-JudRev-Stay-DLsus.ord

LAWRENCE G. WASDEN
Attorney General
State of Idaho

Timothy J. Stover
Special Deputy Attorney General
Idaho Transportation Department
746 N. College Rd., Suite C
P.O. Box 5226
Twin Falls, ID 83303-5226
Telephone: (208) 736-9900
Facsimile: (208) 736-9929
ISB #4842



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

* * * * *

REBECCA SUSAN WILKINSON,

Petitioner,

v.

STATE OF IDAHO, DEPARTMENT OF
TRANSPORTATION,

Respondent.

Case No. CV 2010-0000123

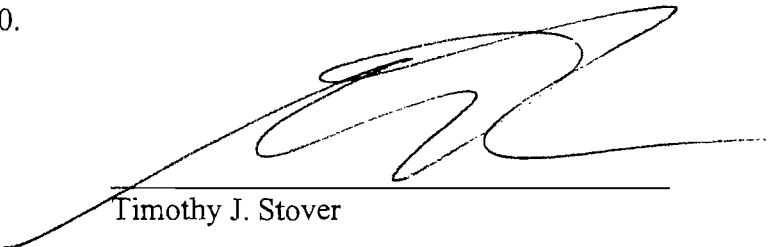
**NOTICE OF FILING
TRANSCRIPTS**

COMES NOW, the Respondent, STATE OF IDAHO DEPARTMENT OF TRANSPORTATION, by and through its counsel of record, Special Deputy Attorney General TIMOTHY J. STOVER and pursuant to IRCP 84(g) and 84(j), provides the Court with the original transcripts of the Administrative License Suspension Hearings for the Idaho Department of Transportation in the Matter of REBECCA SUSAN WILKINSON, File No. 332000025887, held December 1, 2009 and January 26, 2010, before hearing officer Eric Moody of the Idaho Department of Transportation.

By this Notice of Filing of Transcripts, the undersigned hereby provides notice that copies of

said Transcripts have been retained by the undersigned with additional copies being mailed to counsel for Petitioner with this Notice of Filing of Transcripts. Notice is also provided that any objections to the Transcripts shall be filed within fourteen (14) days from the date of mailing of this Notice of Filing of Transcripts with the Idaho Department of Transportation. Failure to file an objection within said fourteen (14) days shall result in the Transcripts being deemed settled. Any objection made to the Transcripts shall be determined by the Idaho Department of Transportation within fourteen (14) days of receipt thereof. The Idaho Department of Transportation's decision on the objection and all evidence, exhibits, and written presentations on the objection shall be included in the record on petition for review.

DATED this 17th day of March, 2010.



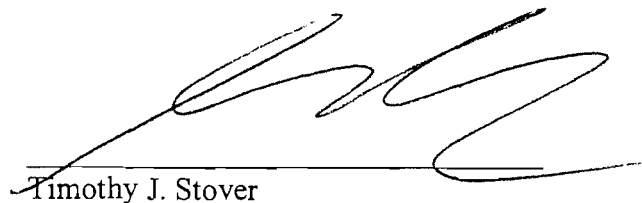
Timothy J. Stover

CERTIFICATE OF SERVICE

The undersigned certifies that on the 17th day of March, 2010, he caused a true and correct copy of the foregoing instrument to be served upon the following persons in the following manner:

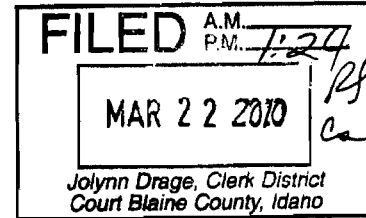
Brian E. Elkins
ATTORNEY AT LAW
P.O. Box 766
Ketchum, ID 83340

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
(208) 726-9328



Timothy J. Stover

Judith Cahoon
Administrative Assistant, Driver Services
Idaho Transportation Department
3311 West State Street
P.O. Box 7129
Boise, Idaho 83701-1129
Telephone: (208) 334-8637
Facsimile: (208) 332-2002



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE


REBECCA SUSAN WILKINSON,)
)
Petitioner,)
)
v.)
)
State of Idaho,)
Department of Transportation)
)
Respondent.)
_____)

Case No. **CV-2010-0000123**

**NOTICE OF FILING
AGENCY RECORD**

Pursuant to I.R.C.P. 84(k), the attached agency record in the above entitled matter is now
deemed settled and is hereby filed.

DATED this 19th day of March, 2010.



Judith Cahoon
Idaho Transportation Department

CERTIFICATE OF SERVICE


I hereby certify that on this 19th day of March, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

BRIAN ELKINS
ATTORNEY AT LAW
PO BOX 766
HAILEY ID 83333

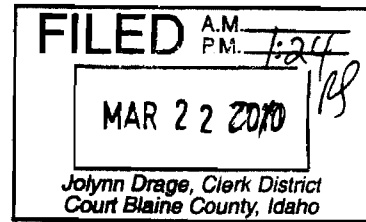
☒ U.S. MAIL
☐ HAND DELIVERED
☐ OVERNIGHT MAIL
☐ TELECOPY (FAX)

TIMOTHY J. STOVER
ATTORNEY AT LAW

☒ ELECTRONIC MAIL
☐ HAND DELIVERED
☐ OVERNIGHT MAIL
☐ TELECOPY (FAX)


Judith Cahoon
Idaho Transportation Department

JUDITH CAHOON
ADMINISTRATIVE ASSISTANT, DRIVER SERVICES
IDAHO TRANSPORTATION DEPARTMENT
3311 WEST STATE STREET
POST OFFICE BOX 7129
BOISE ID 83707-1129
TELEPHONE: (208) 334-8637
FACSIMILE: (208) 332-2002



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

REBECCA SUSAN WILKINSON,
PETITIONER,

V.

STATE OF IDAHO,
DEPARTMENT OF TRANSPORTATION,

RESPONDENT,

CASE NO. **CV-2010-0000123**

AGENCY RECORD

THE FOLLOWING IS A LISTING OF THE DOCUMENTS CONSTITUTING THE AGENCY RECORD IN THIS MATTER:

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Sworn Statement – <i>STATE'S EXHIBIT 3</i>	4-6
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Certification of Receipt of Law Enforcement Documents – <i>STATE'S EXHIBIT 6</i>	9
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Bail Bond Receipt – <i>PETITIONER'S EXHIBIT J</i>	66-67
CD – Unable to Play or Copy CD – <i>PETITIONER'S EXHIBIT K</i>	
Petitioner's Written Argument – <i>PETITIONER'S EXHIBIT L</i>	68-82

CD-R – Able to Copy and Play – *PETITIONER'S EXHIBIT M*

Correspondence – *PETITIONER'S EXHIBIT N* 83

Request for Reconsideration – *PETITIONER'S EXHIBIT O* 84-86

Supplement to Petitioner's Request for

Reconsideration – *PETITIONER'S EXHIBIT P* 87-90

Stipulation to Suppress BAC Results and State's Motion to

Dismiss – *PETITIONER'S EXHIBIT Q* 91-92

Court Records – *PETITIONER'S EXHIBIT R* 93-94

Subpoena – Civil – *PETITIONER'S EXHIBIT S* 95

Argument - Attorney – *PETITIONER'S EXHIBIT T* 96-98

Notice of Telephone Hearing 99-124

Findings of Fact and Conclusions of Law and Order 125-139

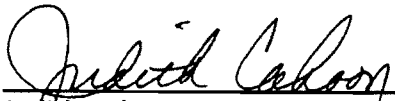
Petition for Judicial Review 140-168

Correspondence 169

Correspondence 170

Procedural Order Governing Judicial Review of Agency Action by District 171-175

DATED THIS 19TH DAY OF MARCH, 2010.



Judith Cahoon
Idaho Transportation Department



NOTICE OF SUSPENSION for Failure of Evidentiary Testing
(Advisory for Sections 18-8002 and 18-8002A, Idaho Code)

DR #

Issued To:

Wilkinson Rebecca S
Last Name First Middle

122 Deer Run Rd
Mailing Address

Ketchum IN 83340
City State Zip

Blaine
County of Arrest

10-11-09
Date of Arrest

0214
Time of Arrest

Driver's License Number

State

License Class

25887
Citation #

Operating CMV? ☐ Yes ☒ No
Transporting Hazmat? ☐ Yes ☒ No

SUSPENSION ADVISORY

- I have reasonable grounds to believe that you were driving or were in physical control of a motor vehicle while under the influence of alcohol, drugs, or other intoxicating substances. You are required by law to take one or more evidentiary tests to determine the concentration of alcohol or the presence of drugs or other intoxicating substances in your body. After submitting to the test(s) you may, when practical, at your own expense, have additional tests made by a person of your own choosing. You do not have the right to talk to a lawyer before taking any evidentiary tests to determine the alcohol concentration or presence of drugs or other intoxicating substances in your body.
- If you refuse to take or complete any of the offered tests pursuant to Section 18-8002, Idaho Code:
 - You are subject to a civil penalty of two hundred fifty dollars (\$250).
 - Your Idaho driver's license or permit will be seized if you have it in your possession, and if it is current and valid you will be issued a temporary permit. Non-resident licenses will not be seized and will be valid in Idaho for thirty (30) days from the service of this notice of suspension unless modified or restricted by the court, provided the license is valid in the issuing state. If you were operating a commercial motor vehicle, any temporary permit issued will not provide commercial driving privileges of any kind.
 - You have a right to submit a written request within seven (7) days to the Magistrate Court of Blaine County for a hearing to show cause why you refused to submit to or complete evidentiary testing and why your driver's license should not be suspended.
 - If you do not request a hearing or do not prevail at the hearing, the court will sustain the civil penalty and your license will be suspended with absolutely no driving privileges for one (1) year if this is your first refusal; and two (2) years if this is your second refusal within ten (10) years.
- If you take and fail the evidentiary test(s) pursuant to Section 18-8002A, Idaho Code:
 - Your Idaho driver's license or permit will be seized if you have it in your possession, and if it is current and valid you will be issued a temporary permit. Non-resident licenses will not be seized and shall be valid in Idaho for thirty (30) days from the service of this notice of suspension, provided the license is valid in the issuing state. If you were operating a commercial motor vehicle, any temporary permit issued will not provide commercial driving privileges of any kind.
 - I will serve you with this **NOTICE OF SUSPENSION** that becomes effective thirty days from the date of service on this **NOTICE**, suspending your driver's license or privileges. If this is your first failure of an evidentiary test your driver's license or driving privileges will be suspended for ninety (90) days, with absolutely no driving privileges during the first thirty (30) days. You may request restricted driving privileges for the remaining sixty (60) days of the suspension. Restricted driving privileges will not allow you to operate a commercial motor vehicle. If this is not your first failure of an evidentiary test within the last five (5) years, your driver's license or driving privileges will be suspended for one (1) year with absolutely no driving privileges of any kind during that period.
 - You have the right to an administrative hearing on the suspension before the **IDAHO TRANSPORTATION DEPARTMENT** to show cause why you failed the evidentiary test and why your driver's license should not be suspended. The request must be made in writing and be received by the department within seven (7) calendar days from the date of service of this **NOTICE OF SUSPENSION**. You also have the right to judicial review of the Hearing Officer's decision.
- If you become enrolled in and are a participant in good standing in a drug court approved by the supreme court drug court and mental health court coordinating committee under the provisions of chapter 56, title 19, Idaho Code, you shall be eligible for restricted noncommercial driving privileges for the purpose of getting to and from work, school or an alcohol treatment program, which may be granted by the presiding judge of the drug court, provided that you have served a period of absolute suspension of driving privileges of at least forty five (45) days, that an ignition interlock device is installed on each of the motor vehicles owned or operated, or both, by you and that you have shown proof of financial responsibility.

THIS SUSPENSION FOR FAILURE OR REFUSAL OF THE EVIDENTIARY TEST(S) IS SEPARATE FROM ANY OTHER SUSPENSION ORDERED BY THE COURT.

— PLEASE REFER TO THE BACK OF THIS SUSPENSION NOTICE FOR MORE INFORMATION —

NOTICE OF SUSPENSION: If you have failed the evidentiary test(s), your driving privileges are hereby suspended per #3 above, commencing thirty (30) days from the date of service of this notice. If a blood or urine test was administered, the department may serve a *Notice of Suspension* upon receipt of the test results.

Date of Service 10-11-09

This Section Provides Temporary Driving Privileges.

(If the driver was operating a commercial vehicle, this permit will not provide commercial driving privileges of any kind.)

If issued, this permit grants the same driving restrictions and privileges as those granted by the license/permit seized (except as indicated above), and shall be valid for thirty (30) days from the date you were served this *Notice of Suspension* for failure or refusal of the evidentiary test(s), unless it is canceled or restricted by the court.

Permit Issued? ☒ Yes ☐ No License Surrendered? ☒ Yes ☐ No
A permit was not issued: ☐ Suspended ☐ Not in Possession ☐ Invalid ☐ Expired ☐ Issued by Another Jurisdiction ☐ Not Licensed

Refused to Sign
Signature of Temporary Licensee (if you are issued a permit, it is not valid until you sign it)

Signature of Reporting Officer

Print Name and ID Number of Reporting Officer (PRINT)

Agency Code

Telephone Number

Department use only: Failure: ☐ Breath ☐ Urine/Blood ☐ Refusal

001

66

SUSPENSION INFORMATION:

The audio version of the suspension advisory substantially conforms to the written text of the suspension advisory.

FOR REFUSAL OF EVIDENTIARY TESTING (PURSUANT TO SECTION 18-8002, IDAHO CODE):

You have the right to submit a written request within seven (7) days to the Magistrate Court indicated on the face of this notice for a hearing to show cause why you refused to submit to or complete evidentiary testing. This is your opportunity to show cause why you refused to submit or failed to complete evidentiary testing and why your driver's license should not be suspended. NOTE: A HEARING REQUEST FOR REFUSING EVIDENTIARY TESTING MUST BE SUBMITTED TO THE MAGISTRATE COURT.

If you fail to request a hearing or do not prevail at the hearing, you are subject to a \$250 civil penalty and the court will suspend your driver's license and privileges with absolutely no driving privileges for one (1) year for your first offense, or for two (2) years for your second offense within ten (10) years (unless you meet the provisions of section 4 as noted in the suspension advisory on the reverse side).

FOR FAILING EVIDENTIARY TESTING (PURSUANT TO SECTION 18-8002A, IDAHO CODE):

You have been served this *Notice of Suspension* by a peace officer who had reasonable grounds to believe that you were operating a vehicle while intoxicated. After submitting to the test(s), you may, when practicable, have additional tests conducted (at your own expense).

If you take the evidentiary test(s) and the results indicate an alcohol concentration of .08 or greater (.02 or greater if you are under 21 years of age), or the presence of drugs or other intoxicating substances in violation of the provisions of Sections 18-8004, 18-8004C, and 18-8006, Idaho Code, the peace officer shall:

1. A. Seize your driver's license, (unless you are an out-of-state resident).
 - B. Issue you a temporary driving permit which shall be valid for thirty (30) days from the date of service indicated on the reverse side of this *Notice of Suspension*, if you have surrendered a current valid Idaho license. If you were operating a commercial motor vehicle, any temporary permit issued will not provide commercial driving privileges of any kind.
 - C. Serve you with this *Notice of Suspension* that becomes effective thirty (30) days after the date of service indicated on the reverse side of this notice. Failure of an evidentiary test will result in a ninety (90)-day suspension of driving privileges, with absolutely no driving privileges during the first thirty (30) days of the suspension. You may request restricted driving privileges during the final sixty (60) days of the suspension. If this is not your first failure of an evidentiary test within the last five (5) years, all of your driving privileges will be suspended for one (1) year with absolutely no driving privileges of any kind (unless you meet the provisions of section 4 as noted in the suspension advisory on the reverse side).
2. If you were operating or in physical control of a commercial vehicle and the evidentiary test results indicate an alcohol concentration of:
 - A. .04 to less than .08, your commercial driving privileges will be suspended for ninety (90) days. You will have absolutely no commercial driving privileges of any kind. Any temporary permit issued will be for Class D (non-commercial) driving privileges only.
 - B. .08 or greater (.02 or greater if you are under 21 years of age), or test results indicate the presence of drugs or other intoxicating substances, all of your driving privileges will be suspended for ninety (90) days, with possible Class D driving privileges for the final sixty (60) days of the suspension. You will have absolutely no commercial driving privileges of any kind during the full ninety (90)-day suspension.
 - C. If this is not your first failure of an evidentiary test within the last five (5) years, all of your driving privileges will be suspended for one (1) year and you will have absolutely no driving privileges of any kind (unless you meet the provisions of section 4 as noted on the reverse side).

HEARING REQUEST FOR FAILURE OF EVIDENTIARY TEST:

You have the right to request an administrative hearing on the suspension **BEFORE THE IDAHO TRANSPORTATION DEPARTMENT**. Your request must be made in writing and be received by the department no later than seven (7) calendar days after the date of service of this *Notice of Suspension*. The request **must state the issues intended to be raised at the hearing**, and must include your name, date of birth, driver's license number, date of arrest, and daytime telephone number because the hearing will be held by telephone. The burden of proof, by preponderance of evidence, shall be upon the driver as to the issues raised in the hearing, pursuant to Section 18-8002A(7), Idaho Code.

If you request a hearing, it shall be held within twenty (20) days of the date the hearing request was received by the Idaho Transportation Department. (Section 18-8002A, Idaho Code) If you do not request an administrative hearing within seven (7) days of service of this *Notice of Suspension*, your right to contest the suspension is waived. This suspension is separate and apart from any suspension that may be ordered by the court as a result of any criminal charges that may be brought against you.

JUDICIAL REVIEW:

You may appeal the decision of the Hearing Officer by seeking judicial review to the District Court. (Section 18-8002A, Idaho Code). Your appeal must be filed as a civil proceeding in District Court, pursuant to Chapter 52, Title 67, Idaho Code.

RESTRICTED DRIVING PERMITS:

If your driving privileges are suspended for a period of ninety (90) days pursuant to Section 18-8002A, Idaho Code, you may request restricted driving privileges for the final sixty (60) days of the suspension (IDAPA Rule 39.02.70.) Restricted driving privileges will not allow you to operate a commercial motor vehicle. You may make your written request for restricted driving privileges any time after the service of this *Notice of Suspension*.

REINSTATEMENT REQUIREMENTS:

Before being reinstated on this suspension, you will be required to pay a reinstatement fee. Any other suspension imposed by the court for this offense will require an additional reinstatement fee.

To request an administrative hearing or apply for a restricted driving permit relating to an administrative license suspension for failing evidentiary testing:

- Make your request in writing (including a daytime telephone number) to the Idaho Transportation Dept., Driver Services Section, PO Box 7129, Boise, ID 83707-1129, OR
- Fax your request to Driver Services at (208) 332-4124.

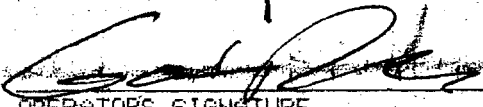
If you have questions or need additional information regarding this notice or your driving privileges, call Driver Services at 334-8735.

002
56

BLAINE COUNTY SHERIFF
INTOXILYZER - ALCOHOL
MODEL 5000EN SN 68201
10/11/2009 SOLUTION LOT NO. 09002

SUB NAME=WILKINSON, REBECCA S
SUB DOB =11/14/85
O.L.N.=ID/FA127022G
OPER NAME=DAVIS, GARTH W
ARREST AGENCY=0703

TEST	BAC	TIME
AIR BLANK	.000	02:36 MDT
INTERNAL STANDARDS PASSED		02:37 MDT
AIR BLANK	.000	02:37 MDT
SIMULATOR TEMPERATURE IN RANGE		
SIN CHK #0012	.085	02:37 MDT
ACCEPTABLE -		
AIR BLANK	.000	02:37 MDT
SUBJECT TEST	.155	02:39 MDT
AIR BLANK	.000	02:39 MDT
SUBJECT TEST	.151	02:40 MDT
AIR BLANK	.000	02:40 MDT


OPERATORS SIGNATURE

0226
TIME FIRST OBSERVED

EXHIBIT

2

~~0226~~ Rebecca S. Wilkinson

SUBJECT'S NAME

-0226

Blaine County

IN THE DISTRICT COURT OF THE 5th JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE.

EXHIBIT
3

THE STATE OF IDAHO,

Plaintiff,

COURT CASE NUMBER _____
PROBABLE CAUSE AFFIDAVIT IN SUPPORT
OF ARREST

REBECCA S. WILKINSON

Defendant.

DOB: _____

SSN: _____

DL#: _____

State: IDAHO

State of Idaho,

County of BLAINE

ss

I, GARTH DAVIS, the undersigned, being first duly sworn on oath, depose and say that:

1. I am a peace officer employed by HAILEY POLICE DEPARTMENT.
2. The defendant was arrested on October 11, 2009 at 0214 ☒ AM ☐ PM for the crime of driving or in physical control of any vehicle while under the influence of alcohol, drugs or any other intoxication substances in a public location or on private property open to the public.
3. Location of Occurrence: NORTH MAIN STREET AND EAST MYRTLE STREET
4. Identified the defendant as: (name) REBECCA S. WILKINSON by: (check box)
☐ Military ID ☐ State ID Card ☐ Student ID Card ☒ Drivers License ☐ Credit Cards
☐ Paperwork found ☐ Verbal ID by defendant
Witness: _____ identified defendant.
Other: _____
5. The crime was committed in my presence. ☒ Yes ☐ No
6. I believe that there is probable cause to believe the defendant committed such crime because of the following facts: (NOTE: You must state the source of all information provided below. State what you observed and what you learned from someone else, identifying that person)

OCT 14 2009 IDREC'D

PROBABLE CAUSE FOR STOP AND ARREST:

☒ Yes ☐ No On October 11, 2009 at approximately 0201 hours, I was traveling southbound on South Main Street. I observed a white 2003 Lexus LX470 (Idaho license #4176B) traveling northbound on South Main Street. As the Lexus passed the intersection with Elm Street, I observed the vehicle was traveling directly over the lane dividers. I conducted a u-turn and as the Lexus passed the intersection with Walnut Street, I observed the vehicle was now traveling in the left hand lane. I then observed the Lexus travel over the lane divider with the passenger side tires approximately 3 feet over the line. As the Lexus passed the intersection with Bullion Street, I

observed the Lexus cross into the center turn lane, with the driver's side tires approximately 1 foot over the line. The Lexus then changed lanes after passing the intersection with Carbonate Street, and traveled into the right hand lane. The Lexus failed to use a turn signal when changing lanes. The Lexus then slowed to 12 mph which I confirmed with my patrol vehicle speedometer and radar. The Lexus continued northbound and as the vehicle passed the intersection with Silver Street, I activated my emergency lights and initiated a traffic stop. The Lexus continued northbound on South Main Street for approximately 2 blocks before stopping prior to the intersection with Myrtle Street.

I made contact with the driver of the Lexus, Rebecca Wilkinson, identified by her Idaho driver's license. I explained to Rebecca the reason for the stop. I could smell the odor of an alcoholic beverage emitting from Rebecca as she spoke to me. I observed Rebecca's eyes were glassy and bloodshot. I asked Rebecca how much she had to drink tonight and in a slurred speech she stated "some".

I instructed Rebecca to turn off the Lexus and step out of the vehicle and walk to the sidewalk. I then offered Rebecca the Standardized Field Sobriety Test's (SFST's). Rebecca met the decision points to fail the SFST's and I placed her under arrest for Driving Under the Influence.

I transported Rebecca to the Blaine County Jail to test her Blood Alcohol Content (BAC) on the Intoxilyzer 5000. Upon arrival I checked Rebecca's mouth for any foreign substances and began my waiting period at 0226 hours, according to my personal wristwatch. I played the ALS audio tape for Rebecca. After the ALS audio tape finished I asked Rebecca if she had any questions and she stated it was a lot of information to hear. I handed Rebecca the ALS form for her to read. I asked Rebecca if she wished to continue and she stated she would give a breath sample. At 0243 hours, according to my personal wristwatch Rebecca's BAC revealed .165 and .151. I booked Rebecca into the Blaine County Jail for Driving Under the Influence of Alcohol under I.C.18-8004. I issued Rebecca the goldenrod copy of the ALS form which she refused to sign.

D.U.I. NOTES

Odor of alcoholic beverage	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Admitted drinking alcoholic beverage	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Slurred speech	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Impaired memory	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Glassy/bloodshot eyes	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No

Other _____

Sobriety Tests

Gaze Nystagmus	<input type="checkbox"/> Pass	<input checked="" type="checkbox"/> Fail
Walk & Turn	<input type="checkbox"/> Pass	<input checked="" type="checkbox"/> Fail
One Leg Stand	<input type="checkbox"/> Pass	<input checked="" type="checkbox"/> Fail
Accident Involved	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Injury	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

Drugs Suspected ☐ Yes ☒ No Drug Recognition Evaluation Performed ☐ Yes ☒ No
Reason Drugs are Suspected: _____

Defendant was tested for alcohol concentration, drugs or other intoxicating substances. Prior to testing, defendant was substantially informed of the consequences of refusal and failure of the test as required by Section 18-8002 and 18-8002A, Idaho Code. The test(s) was/were performed in compliance with Sections 18-8003 & 18-8004(4), Idaho Code and the standards and methods adopted by the Department of Law Enforcement.

BAC: .165/.151 by: ☒ Breath Instrument Type: ☒ Intoxilyzer 5000 ☐ Alco Sensor Serial#: _____

☐ Blood AND/OR ☐ Urine Test Results Pending? ☐ Yes ☐ No (Attached) ☐ Refusal

Second or more D.U.I. offense in last five years? ☐ Yes ☒ No

Name of person administering breath test: GARTH DAVIS Date certification expires: 05/31/2010

OCT 14 2009 ITD REC'D

By my signature and in the presence of a person authorized to administer Oaths in the State of Idaho, I hereby solemnly swear that the information contained in this document and associated reports and documents included herein and made a part hereof is true and correct to the best of my information and belief.

Dated: 10/11/2009

Signed: _____

(affiant)

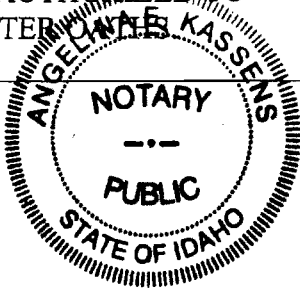
Subscribed and sworn to before me on 10/11/09

(Date)

(or)

PERSON AUTHORIZED TO
ADMINISTER OATHS

Title: _____



NOTARY PUBLIC FOR IDAHO

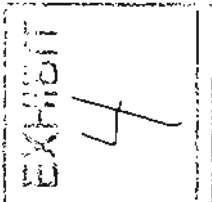
Residing at: Blaine County

My Commission expires: 9-27-2013

OCT 14 2009 IDREC'D

50048

KINSON, REBECCA SUSAN
27022G



11/14/65

OCT 14 2009 ITD RECD

007
67

CLASS D

IDAHO

DRIVER'S
LICENSE

EXPIRES: 11/14/2012

NUMBER: FA127022G

ISSUED: 07/17/2006

RSTS:

ENDR:

DUPLICATE



WILKINSON, REBECCA SUSAN

122 DEER RUN RD
KETCHUM, ID 83340

DATE OF BIRTH

11/14/1965

SEX: F

HEIGHT: 5-06

WEIGHT: 125

HAIR: BRN

EYES: BRN

DONOR:

City of Hailey

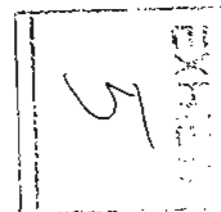
POLICE DEPARTMENT
115 South Main St. Suite C
Hailey, Idaho 83333



ATTN: DRIVER SERVICES-ALS
IDAHO TRANSPORTATION
DEPARTMENT
PO BOX 7129
BOISE, ID 83707-1129

OCT 14 2009 ITD RECD

8370731129 B071

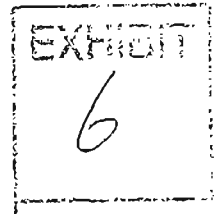


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Certification of Receipt of Law Enforcement Documents

I hereby certify that the following documents were received from the sender attached and/or incorporated together **:



- ☒ Notice of Suspension Advisory Form - Original
- ☐ Notice of Suspension Advisory Form - Goldenrod
- ☒ Evidentiary Test Results
- ☐ Instrument Calibration Check
- ☐ Instrument Operations Log
- ☒ Sworn Statement
- ☐ Incident/Arrest/Narrative Reports
- ☐ Witness Statements
- ☐ LAW Incident Table
- ☐ Main Radio Log
- ☐ Affidavit and/or Order Finding Probable Cause
- ☐ Influence Report
- ☐ Pre-Booking Information Sheet
- ☐ Photocopy of Citation(s)
- ☐ Evaluations
- ☐ Impound Report
- ☐ Towed Vehicle Report
- ☐ Field Sobriety Tests
- ☐ Video Tape Notes
- ☐ Vehicle Collision Report
- ☐ Teletype Records
- ☐ Miranda Rights
- ☒ Driver License - evidenced by attached photocopy

Other documents attached and/or incorporated together**:

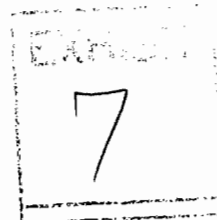
- | | |
|--------------------------------|--------------------------------|
| <input type="checkbox"/> _____ | <input type="checkbox"/> _____ |
| <input type="checkbox"/> _____ | <input type="checkbox"/> _____ |
| <input type="checkbox"/> _____ | <input type="checkbox"/> _____ |



Signature of Driver Services Employee

** Staples and other attaching devices are typically removed from documents for the purpose of photocopying and microfilming

BRIAN E. ELKINS, P.C.
 Attorney at Law
 208 Spruce Avenue North
 P. O. Box 766
 Ketchum, ID 83340
 Telephone: (208) 726-4338
 Facsimile: (208) 726-9328
 E-mail: beelkins@cox.net
 Idaho State Bar No. 3150



Attorney for Petitioner

BEFORE THE ALS HEARING SECTION OF THE
 STATE OF IDAHO IN AND FOR THE IDAHO TRANSPORTATION DEPARTMENT

IN THE MATTER OF THE
 SUSPENSION OF THE DRIVER'S
 LICENSE OF

REBECCA S. WILKINSON,
 Petitioner.

) Driver's License No.: FA127022G

) File No.

) CONDITIONAL REQUEST FOR
) ADMINISTRATIVE HEARING
) AND OBJECTION

The above named Petitioner, Rebecca S. Wilkinson, by and through her attorney, Brian E. Elkins, pursuant to Idaho Code § 18-8002A(7) and IDAPA 39.02.72.100, hereby conditionally requests an administrative hearing on the proposed suspension of Petitioner's driving privileges brought pursuant I.C. § 18-8002A(4). This request is conditioned upon any intent of the Idaho Transportation Department ("ITD") to attempt to suspend any of Petitioner's driving privileges as a result of being charged with the offense of Driving While Under the Influence of Alcohol, in violation of Idaho Code § 18-8004 and allegedly failing an evidentiary test for alcohol concentration. In the event ITD does not intend to initiate suspension proceedings or the arresting officer failed to forward the necessary documents to ITD within the time limits

CONDITIONAL REQUEST FOR ADMINISTRATIVE HEARING AND OBJECTION, p. 1

proscribed by Idaho Code § 18-8002A(5)(b), i.e., within five (5) business days following the service of a notice of suspension, then no hearing is requested.

In the event this matter proceeds, then the following is submitted:

a. *Petitioner's full name, complete mailing address and telephone number where the hearing will be conducted:*

Rebecca S. Wilkinson
c/o Brian E. Elkins
Attorney at Law
P. O. Box 766
Ketchum, ID 83340

208.726.4338

b. *The driver's license number:* FA127022G

c. *The petitioner's date of birth:* 11-14-1965

d. *The date of arrest:* 10-11-2009

e. A brief statement of the issues the petitioner proposes to raise at the hearing:

1. The peace officer did not have legal cause to stop the petitioner.
2. The officer did not have legal cause to believe the person had been driving or was in actual physical control of a vehicle while under the influence of alcohol, drugs or other intoxicating substances in violation of the provisions of Idaho Code §§ 18-8004 (4), 18-8004C or 18-8006.
3. The test results did not show an alcohol concentration or the presence of drugs or other intoxicating substances in violation Idaho Code §§ 18-8004, 18-8004C, 18-8006.
4. The tests for alcohol concentration, drugs or other intoxicating substances administered at the direction of the peace officer were not conducted in accordance with the requirements of Idaho Code § 18-8004 (4), applicable IDAPA regulations, manuals/standard operating procedures for the breath testing device, or the testing equipment was not functioning properly when the test was administered.
5. The Petitioner was not informed of the consequences of submitting to evidentiary testing as required in Idaho Code § 18-8002A (2).
6. Any potential issue that could be raised by failure of the officer, or ITD, to comply with any and all provisions of Idaho Code § 18-8002A.
7. That the *Idaho Transportation Department Section 18-8002 and 18-8002A, Idaho Code Advisory and Notice of Suspension for Failure to Evidentiary Testing ("NOS")* is drafted so poorly, is so confusing, inconsistent with the law, deficient, and ambiguous that it violates the Due Process Clauses and Equal Protection Clauses of the Idaho and Federal Constitutions.
8. Any violations that occurred in this matter that offend the Petitioner's rights as

CONDITIONAL REQUEST FOR ADMINISTRATIVE HEARING AND OBJECTION, p. 2

guaranteed by the Idaho and Federal Constitutions.

9. Any issue that may be raised based upon any "Relevant Evidence" as defined in Idaho Rules of Evidence 401 and as may be admissible under IRE 402.

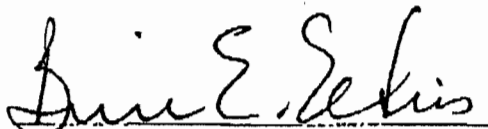
f. Petitioner hereby requests, in order to properly prepare for the hearing, copies of the following:

1. The information required to be submitted to ITD by the arresting officer as provided in Idaho Code § 18-8002A(5).
2. Certification of the breath testing device.
3. Certification of the arresting officer that he/she is authorized to perform blood alcohol concentration tests.
4. A certified copy or duplicate original of the results of all tests for alcohol concentration, drugs or other intoxicating substances as shown by analysis of blood, urine or breath administered at the direction of the officer.
5. Copies of any and all police reports, statements, written documentation and access to any information as allowed by IDAPA 04.11.01000.520 *et. eq.*
6. Any document that ITD has in its file in this matter.

g. *Any dates or times that the Petitioner's attorney cannot be available for the hearing:*

Counsel is unavailable: October 26, 28 (2:00 p.m. until 5:00 p.m.), 30; November 4 (2:00 p.m. until 5:00 p.m.), 5 (2:15 p.m. until 3:30 p.m.), 10, 16 (1:30 p.m. until 4:00 p.m.), 19, 2009.

DATED this 19 day of October, 2009.


Brian E. Elkins
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19 day of October, 2009, I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

Driver Services/ALS Hearing Section _____ Mailed

Idaho Transportation Department

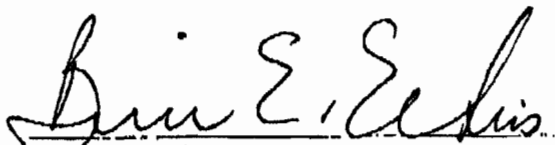
P. O. Box 7129

Boise, Id. 83707-1129

_____ Hand-Delivered

☒ Faxed to Fax Number 208.332.7810

_____ Faxed and mailed


Brian E. Elkins

als/Wilkinson.rlh

BRIAN E. ELKINS, P.C.
Attorney at Law
208 Spruce Avenue North
P. O. Box 766
Ketchum, ID 83340
Telephone: (208) 726-4338
Facsimile: (208) 726-9328
E-mail: beelkins@cox.net
ISB No. 3150

Attorney for Petitioner

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE
STATE OF IDAHO IN AND FOR THE IDAHO TRANSPORTATION DEPARTMENT

IN THE MATTER OF THE	)	License/Identification No.: FA127022g
SUSPENSION OF THE DRIVER'S)	
LICENSE OF	)	File No.:
)	
REBECCA S. WILKINSON,	)	MOTION FOR ISSUANCE OF
	)	SUBPOENAS
Petitioner.)	
)	
)	
)	

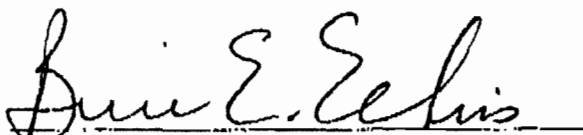
The above named Petitioner, Rebecca S. Wilkinson, by and through her attorney, Brian E. Elkins, pursuant to IDAPA 39.02.72.300.01 and IDAPA 04.11.01000.525, requests that the ALS hearing officer appointed to this matter, issue Subpoenas directing that the following officers involved in this matter appear at the ALS Hearing:

1. Arresting officer Garth Davis from the Hailey Police Department;
2. "Breath Testing Specialist" ("BTS"), Sgt. Brad Gelsky of the Blaine County Sheriff's Department who maintains the machine used in this matter;
3. A subpoena duces tecum to be served on the evidence custodian for the operations log sheet for the breath testing machine at the Blaine County Sheriff's

MOTION FOR ISSUANCE OF SUBPOENAS, p. 1

Department, Intoxilyzer 5000EN, Serial No. 68-013466 showing the relevant calibration checks with the corresponding Simulator Solution Lot changes.

DATED this 19 day of October, 2009



Brian E. Elkins

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19 day of October, 2009, I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

Driver Services

Idaho Transportation Department

P. O. Box 7129

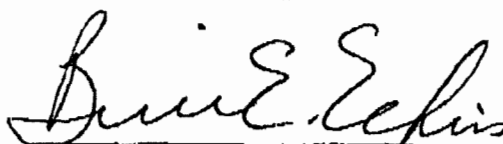
Boise, Id. 83707-1129

☐ Mailed

☐ Hand-Delivered

☒ Faxed to Fax Number 208.332.7810

☐ Faxed and mailed



Brian E. Elkins

als\Subpoena.req

BRIAN E. ELKINS, P.C.
 Attorney at Law
 208 Spruce Avenue North
 P. O. Box 766
 Ketchum, ID 83340
 Telephone: (208) 726-4338
 Facsimile: (208) 726-9328
 E-mail: beelkins@cox.net
 ISB No. 3150

Attorney for Petitioner

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE
 STATE OF IDAHO IN AND FOR THE IDAHO TRANSPORTATION DEPARTMENT

IN THE MATTER OF THE	)	License/Identification No. FA127022G
SUSPENSION OF THE DRIVER'S)	
LICENSE OF	)	File No.:
)	
REBECCA S. WILKINSON,	)	MOTION FOR ISSUANCE OF
	)	SUBPOENA DUCES TECUM
Petitioner.)	
)	
)	

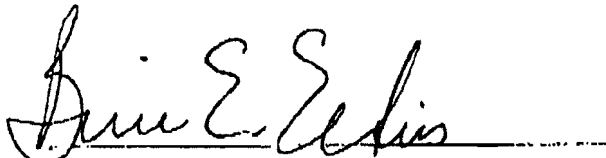
The above named Petitioner, Rebecca S. Wilkinson, by and through her attorney, Brian E. Elkins, requests that the ALS hearing officer appointed in this matter issue a Subpoena Duces Tecum directing the "Breath Testing Specialist" ("BTS") Brad Gelsky of the Blaine County Sheriff's Department, who maintains the particular breath testing machine used herein, Instrument Serial Number 68-913466, submit to counsel for the Petitioner, prior to the ALS hearing:

1. Instrument Operations Log ("IOL") showing the calibration sequence at least 30 days prior to the Petitioner's arrest (that being October 11, 2009) showing the .08 and .20 calibration checks with the corresponding simulator solution lot changes through the most current entry on

MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM, p. 1

the IOL.

DATED this 19 day of October, 2009



Brian E. Elkins
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19 day of October, 2009, I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

Driver Services

Idaho Transportation Department

P. O. Box 7129

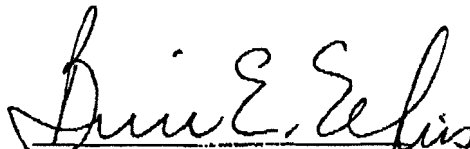
Boise, Id. 83707-1129

_____ Mailed

_____ Hand-Delivered

☒ Faxed to Fax Number 208.332.7810

_____ Faxed and mailed



Brian E. Elkins

als\SubpoenaDC.req

MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM, p. 2

BRIAN E. ELKINS

ATTORNEY AT LAW
A PROFESSIONAL CORPORATION110 TERRACE SQUARE PROFESSIONAL BUILDING
200 SPRUCE AVENUE NORTH
P.O. BOX 766
KETCHUM, IDAHO 83340TELEPHONE (208) 726-4338
FACSIMILE (208) 726-9328
E-MAIL: beelkins@cox.net

FAX TRANSMITTAL COVER PAGE

DATE: October 16, 2009

TO: Idaho Transportation Department
ALS Hearing Section

VIA FACSIMILE: 208-332-7810

Re: *In the Matter of the Suspension of the Driver's License of Rebecca S. Wilkinson*
Lic /IDENT No: FA127022GPages attached (including this cover sheet): 9

Hi Callie/Vicky:

With respect to the above referenced matter, attached please find:

1. Conditional Request for Administrative Hearing and Objection
2. Motion for Issuance of Subpoenas
3. Motion for Issuance of Subpoena Duces Tecum

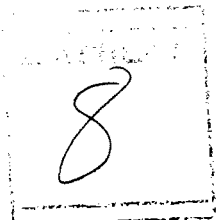
Thank you.

Very truly yours,

Brian E. Elkins

cc: Rex Wilkinson

WARNING: This message is intended only for the use of the individual to which it is addressed and may contain information that is privileged, confidential or otherwise exempt from disclosure under applicable law. If you are not the intended recipient, you are notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return this original message to us at the above address via the U.S. Postal Service. Collect calls accepted.

**IDAHO TRANSPORTATION DEPARTMENT**Driver Services • P.O. Box 7129
Boise ID 83707-1129(208) 334-8735
dmv.idaho.gov

50048-CA

(208) 334-8736

REQUESTED BY: WILKINSON, REBECCA SUSAN

PAGE 1

BOX 4976
KETCHUM

ID 83340

D R I V E R L I C E N S E R E C O R D

10/20/2009

FOR:

WILKINSON, REBECCA SUSAN

LICENSE NO: [REDACTED]

ISSUE TYPE: DL

BIRTH DATE: [REDACTED]

CLASS: D

BOX 4976

ISSUED: 07/17/2006

OPR STATUS: VALID

KETCHUM

ID 83340

EXPIRES: 11/14/2012

CDL STATUS: NOTLIC

DRV TRAIN: NO

RSTR: NONE

TYPE	DATE	DESC	CLS	DOC #
CITN	09/25/07	BASIC RULE	LOC:HAILEY	
CONV	10/18/07	GLTP PTS:3	CRT:HAILEY	332ISTAR7295
ORD:	INFR			

CITN	01/04/08	BASIC RULE	LOC:LINCOLN	
CONV	01/08/08	GLTP PTS:3	CRT:SHOSHONE	388ISTAR8010
ORD:	INFR			

PEND 11/10/09 ALS08+ORDRUG TO 02/08/10 OPR 332000025887

12 MONTH POINTS: 0 24 MONTH POINTS: 3 36 MONTH POINTS: 6

POINTS ASSESSED ARE FOR DEPARTMENTAL USE ONLY, IN DETERMINING SUSPENSIONS
FOR POINTS OR HABITUAL VIOLATIONS.THIS IS THE ENTIRE DRIVING RECORD. POINTS ARE ASSESSED FOR THE
LAST 3 YEARS ONLY.

END OF EXISTING RECORD

CONTINUED

**IDAHO TRANSPORTATION DEPARTMENT**Driver Services • P.O. Box 7129
Boise ID 83707-1129(208) 334-8735
dmv.idaho.gov

50048-CA

(208) 334-8736

REQUESTED BY: WILKINSON, REBECCA SUSAN

PAGE 2

BOX 4976
KETCHUM

ID 83340

D R I V E R L I C E N S E R E C O R D

10/20/2009

FOR:

WILKINSON, REBECCA SUSAN

BOX 4976
KETCHUM

ID 83340

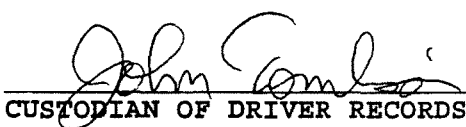
ISSUED: 07/17/2006 OPR STATUS: VALID
EXPIRES: 11/14/2012 CDL STATUS: NOTLIC
DRV TRAIN: NO

RSTR: NONE

TYPE	DATE	DESC	CLS	DOC #
------	------	------	-----	-------

AS AN EMPLOYEE OF THE TRANSPORTATION DEPARTMENT, I AM AN
OFFICIALLY APPOINTED CUSTODIAN OF DRIVING RECORDS. I
HEREBY CERTIFY THE FOREGOING IS A TRUE AND CORRECT COPY
OF THE ORIGINAL DRIVING RECORDS OF THIS DEPARTMENT.

OCTOBER 20, 2009

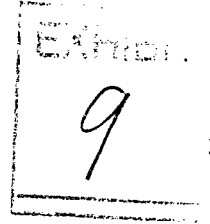

CUSTODIAN OF DRIVER RECORDS

SECTION 49-203 IDAHO CODE PROHIBITS THE RELEASE OF PERSONAL INFORMATION
CONTAINED IN DRIVER [REDACTED] RECORDS TO UNAUTHORIZED PARTIES, WITHOUT THE
EXPRESS WRITTEN CONSENT OF THE INDIVIDUAL THE INFORMATION PERTAINS TO.
AS AN AUTHORIZED REQUESTOR YOU MAY RECEIVE THIS INFORMATION BUT YOU MAY
NOT RE-RELEASE OR RE-SELL IT.

END OF DLR PRINT

74
020

Driver Services Section
Division of Motor Vehicles
Idaho Transportation Department
3311 West State Street
P.O. Box 7129
Boise, Idaho 83707-1129
Telephone: (208) 332-2005/2004
Facsimile: (208) 332-2002



Respondent

IN THE IDAHO TRANSPORTATION DEPARTMENT

STATE OF IDAHO

The Respondent, State of Idaho, Idaho Transportation Department (Department) responds to and answers Petitioner's Request for Discovery as follows:

Idaho Code § 18-8002A(5) requires that certain documentation be forwarded to the Department under the Administrative License Suspension Program where an individual submits to evidentiary testing pursuant to Idaho Code § 18-8002A and the results of the test indicate an alcohol concentration or the presence of drugs or other intoxicating substances in violation of Idaho Code §§ 18-8004, 18-8004C, 18-8006. The documentation forwarded to the Department pursuant to I.C. § 18-8002-A(5) includes a copy of the completed notice of suspension, a copy of the completed temporary permit form, if issued, the confiscated driver's license, if any, and the arresting officer's sworn statement, including a certified copy or duplicate original of test results administered.

In response to Petitioner's Request for Discovery, the Department has attached hereto copies of all documentation received by the Department in accordance with Idaho Code § 18-8002A(5) regarding this matter, along with the Petitioner's driving record, and any other discoverable information and documentation in the department's possession regarding this matter.

This response constitutes full compliance by the Department to Petitioner's Request for Discovery. If further discovery is requested by Petitioner, it is to be done in accordance with the Idaho Rules of Administrative Procedure of the Attorney General.

Additional information:

To:

**BRIAN ELKINS
ATTORNEY AT LAW
PO BOX 766
KETCHUM ID 83340**

Dated and Emailed/Mailed on the 23rd day of October, 2009

Signed

SUBPOENA – CIVIL

IDAHO TRANSPORTATION DEPT.
3311 W. STATE ST.
BOISE, ID 83703

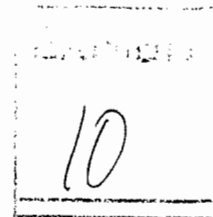
TELEPHONE # (208)332-2005
PO BOX 7129
BOISE, ID 83707

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE STATE OF IDAHO IN AND FOR THE IDAHO
TRANSPORTATION DEPARTMENT

ADMINISTRATIVE HEARING

IN THE MATTER OF THE
DRIVING PRIVILEGES OF
WILKINSON, REBECCA SUSAN

SUBPOENA DUCES TECUM



THE STATE OF IDAHO TO: EVIDENCE CUSTODIAN - BLAINE COUNTY SHERIFF'S OFFICE

You are hereby commanded to produce evidence for an Administrative Hearing before the
Idaho Transportation Department.

You are commanded to provide the following items and documents:

**One copy of the CALIBRATION RECORDS AND INSTRUMENT OPERATION LOGSHEETS for Intoxilyzer 5000EN
SN #68-013466 for the period of September 11, 2009 thru October 12, 2009, showing the .08 and .20 calibration checks
with the corresponding Simulator Solution Lot changes.**

THE SUBPOENAED MATERIAL MUST BE RECEIVED BY November 5, 2009.

Notice To Party To Whom This Subpoena is Directed: This subpoena is issued upon the
condition that the requesting party, Attorney Brian Elkins, Phone #208 726-4338 shall advance the reasonable cost of
producing the books, papers, documents, or tangible things, to the agency providing the evidence.

****IF YOU ARE UNABLE TO COMPLY WITH THIS SUBPOENA, PLEASE IMMEDIATELY CONTACT
Mike AT (208) 334-8720.****

Subpoenaed material must be sent via U.S. Mail or Fax to:


Idaho Transportation Department
A.L.S. Hearing Unit

Att: **Mike**
PO Box 7129
Boise ID 83707-1129
FAX #208 332-2002

This subpoena has been issued in compliance with IDAPA rule 39.02.72.300.01

If you have any questions regarding this subpoena you can contact **Mike** at 334-**8720**

Witness my hand this 23rd day of October 2009.

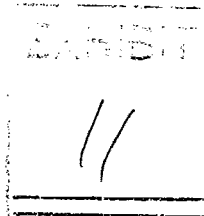
By 
Eric G. Moody
Hearing Officer

*****This subpoena is a single page document. Any additional documents requesting evidence
attached to this subpoena have NOT been approved by the Hearing Examiner and should not be
considered by the recipient of this subpoena.*****

SUBPOENA – CIVIL

IDAHO TRANSPORTATION DEPT.
3311 W. STATE ST.
BOISE, ID 83703

TELEPHONE # (208)334-8720
PO BOX 7129
BOISE, ID 83707



BEFORE THE IDAHO TRANSPORTATION BOARD OF THE STATE
OF IDAHO IN AND FOR THE IDAHO TRANSPORTATION
DEPARTMENT

ADMINISTRATIVE HEARING

IN THE MATTER OF THE
DRIVING PRIVILEGES OF
WILKINSON, REBECCA SUSAN

SUBPOENA

THE STATE OF IDAHO TO: OFFICER GARTH DAVIS - HAILEY POLICE DEPARTMENT

You are hereby commanded to appear before Hearing Officer Eric G. Moody of the Idaho Transportation Department, as a witness in the above-entitled action, by means of a telephone conference call.

YOU WILL NEED TO PROVIDE YOUR TELEPHONE NUMBER TO THE IDAHO DEPARTMENT OF TRANSPORTATION AT (208) 334-8720, PRIOR TO THE DAY OF THE SCHEDULED HEARING.

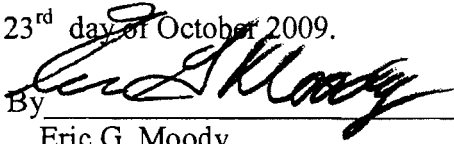
The hearing is scheduled on the 3rd day of November 2009, at Nine o'clock (9:00am) Mountain Time.

****IF YOU ARE UNABLE TO COMPLY WITH THIS SUBPOENA, PLEASE IMMEDIATELY CONTACT MIKE AT (208) 334-8720.****

Further, prior to reporting, for your convenience you may confirm the status of your subpoena by calling the Idaho Transportation Department at (208)332-2005 before the hearing date listed above.

Witness my hand this 23rd day of October 2009.

By


Eric G. Moody
Hearing Officer

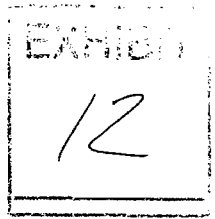
77

023

SUBPOENA – CIVIL

IDAHO TRANSPORTATION DEPT.
3311 W. STATE ST.
BOISE, ID 83703

TELEPHONE # (208)334-8720
PO BOX 7129
BOISE, ID 83707



BEFORE THE IDAHO TRANSPORTATION BOARD OF THE STATE
OF IDAHO IN AND FOR THE IDAHO TRANSPORTATION
DEPARTMENT

ADMINISTRATIVE HEARING

IN THE MATTER OF THE
DRIVING PRIVILEGES OF
WILKINSON, REBECCA SUSAN

SUBPOENA

THE STATE OF IDAHO TO: SGT BRAD GELSKY, BTS - BLAINE COUNTY SHERIFF'S
OFFICE

You are hereby commanded to appear before Hearing Officer Eric G. Moody of the
Idaho Transportation Department, as a witness in the above-entitled action, by means of a
telephone conference call.

**YOU WILL NEED TO PROVIDE YOUR TELEPHONE NUMBER TO THE
IDAHO DEPARTMENT OF TRANSPORTATION AT (208) 334-8720, PRIOR
TO THE DAY OF THE SCHEDULED HEARING.**

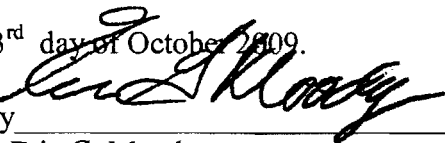
The hearing is scheduled on the 3rd day of November 2009, at Nine o'clock
(9:00am) **Mountain Time.**

****IF YOU ARE UNABLE TO COMPLY WITH THIS SUBPOENA,
PLEASE IMMEDIATELY CONTACT MIKE AT (208) 334-8720.****

Further, prior to reporting, for your convenience you may confirm the status of your
subpoena by calling the Idaho Transportation Department at (208)332-2005 before
the hearing date listed above.

Witness my hand this 23rd day of October 2009.

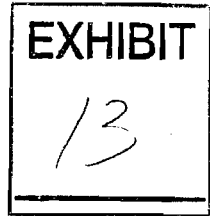
By


Eric G. Moody
Hearing Officer

78

024

IN THE IDAHO TRANSPORTATION DEPARTMENT
STATE OF IDAHO



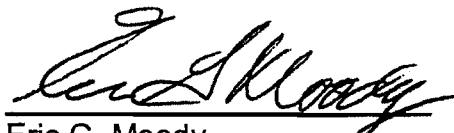
In the Matter of the)
Driving Privileges of)
WILKINSON, REBECCA SUSAN)
_____)

D.L. No. FA127022G
FILE No. 332000025887
STAY
ORDER

Pursuant to Title 67, Idaho Code, and IDAPA rule 04.11.01 the Idaho Transportation Department is hereby ordered to stay WILKINSON, REBECCA SUSAN §18-8002A suspension effective the 5th day of November 2009. The suspension shall be stayed indefinitely pending the written Findings of Fact and Conclusions of Law and Order.

This stay shall not set precedent for stays in future Administrative License Suspension Hearings.

DATED, this 5th day of November 2009.


Eric G. Moody
Hearing Examiner

SUBPOENA – CIVIL

IDAHO TRANSPORTATION DEPT.
3311 W. STATE ST.
BOISE, ID 83703

TELEPHONE # (208)334-8720
PO BOX 7129
BOISE, ID 83707

EXHIBIT

14

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE STATE
OF IDAHO IN AND FOR THE IDAHO TRANSPORTATION
DEPARTMENT

ADMINISTRATIVE HEARING

IN THE MATTER OF THE
DRIVING PRIVILEGES OF
WILKINSON, REBECCA SUSAN

SUBPOENA

THE STATE OF IDAHO TO: OFFICER GARTH DAVIS - HAILEY POLICE DEPARTMENT

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YOU WILL NEED TO PROVIDE YOUR TELEPHONE NUMBER TO THE IDAHO DEPARTMENT OF TRANSPORTATION AT (208) 334-8720, PRIOR TO THE DAY OF THE SCHEDULED HEARING.

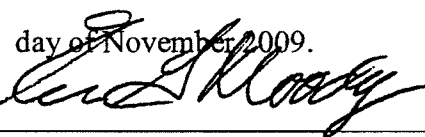
The hearing is scheduled on the 1st day of December 2009, at Three o'clock (3:00pm)Mountain Time.

****IF YOU ARE UNABLE TO COMPLY WITH THIS SUBPOENA, PLEASE IMMEDIATELY CONTACT MIKE AT (208) 334-8720.****

Further, prior to reporting, for your convenience you may confirm the status of your subpoena by calling the Idaho Transportation Department at (208)334-8720 before the hearing date listed above.

Witness my hand this 10th day of November 2009.

By


Eric G. Moody
Hearing Officer

80

026

Transmission Report

Date/Time
Local ID 1
Local ID 2

11-10-2009
2083322064

02:43:16 p.m.

Transmit Header Text
Local Name 1
Local Name 2

EXHIBIT

15

This document : Confirmed
(reduced sample and details below)
Document size : 8.5"x11"

**DRIVER SERVICES
ADMINISTRATIVE HEARING SECTION
PO BOX 7129
BOISE ID 83707
PHONE: 208 334-8720
FAX: 208 332-2002**

**ADMINISTRATIVE
HEARING SECTION**

Fax

To:	Officer Garth Davis	From:	Mike
Fax:	208 788-6566	Date:	November 10, 2009
Phone:		Pages:	2
Re:	CIVIL SUBPOENA REQUEST FOR WILKINSON, REBECCA SUSAN A.L.S. HEARING	CC:	
Comments:			

Thank You

Total Pages Scanned : 2

Total Pages Confirmed : 2

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Abbreviations:

HS: Host send
HR: Host receive
WS: Waiting send

PL: Polled local
PR: Polled remote
MS: Mailbox save

MP: Mailbox print
CP: Completed
FA: Fail

TU: Terminated by user
TS: Terminated by system
RP: Report

G3: Group 3
EC: Error Correct

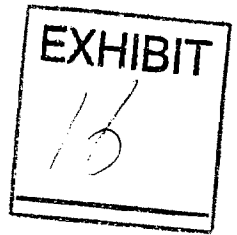
81

027

SUBPOENA – CIVIL

IDAHO TRANSPORTATION DEPT.
3311 W. STATE ST.
BOISE, ID 83703

TELEPHONE # (208)334-8720
PO BOX 7129
BOISE, ID 83707



BEFORE THE IDAHO TRANSPORTATION BOARD OF THE STATE
OF IDAHO IN AND FOR THE IDAHO TRANSPORTATION
DEPARTMENT

ADMINISTRATIVE HEARING

IN THE MATTER OF THE
DRIVING PRIVILEGES OF
WILKINSON, REBECCA SUSAN

SUBPOENA

THE STATE OF IDAHO TO: SGT BRAD GELSKY, BTS - BLAINE COUNTY SHERIFF'S
OFFICE

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Idaho Transportation Department, as a witness in the above-entitled action, by means of a
telephone conference call.

**YOU WILL NEED TO PROVIDE YOUR TELEPHONE NUMBER TO THE
IDAHO DEPARTMENT OF TRANSPORTATION AT (208) 334-8720, PRIOR
TO THE DAY OF THE SCHEDULED HEARING.**

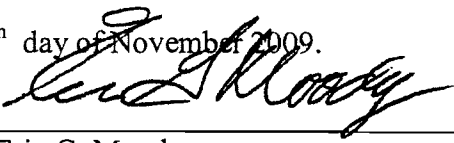
The hearing is scheduled on the 1st day of **December** 2009, at **Three o'clock**
(3:00pm)**Mountain Time.**

****IF YOU ARE UNABLE TO COMPLY WITH THIS SUBPOENA,
PLEASE IMMEDIATELY CONTACT MIKE AT (208) 334-8720.****

Further, prior to reporting, for your convenience you may confirm the status of your
subpoena by calling the Idaho Transportation Department at (208)334-8720 before
the hearing date listed above.

Witness my hand this 10th day of November 2009.

By


Eric G. Moody
Hearing Officer

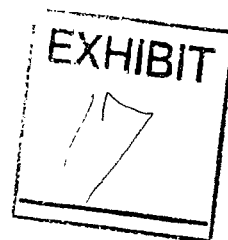
Transmission Report

Date/Time
Local ID 1
Local ID 2

11-10-2009
2083322064

02:44:27 p.m.

Transmit Header Text
Local Name 1
Local Name 2



This document : Confirmed
(reduced sample and details below)
Document size : 8.5"x11"

DRIVER SERVICES
ADMINISTRATIVE HEARING SECTION
PO BOX 7129
BOISE ID 83707
PHONE: 208 334-8720
FAX: 208 332-2002

ADMINISTRATIVE
HEARING SECTION

Fax

To: Sgt Brad Gelsky - BTS **From:** Mike
Fax: 208 788-4105 **Date:** November 10, 2008
Phone: **Pages:** 2
Re: CIVIL SUBPOENA REQUEST **CC:**
FOR WILKINSON, REBECCA
SUSAN A.L.S. HEARING

Comments

Thank You

Total Pages Scanned : 2

Total Pages Confirmed : 2

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Abbreviations:

HS: Host send
HR: Host receive
WS: Waiting send

PL: Polled local
PR: Polled remote
MS: Mailbox save

MP: Mailbox print
CP: Completed
FA: Fall

TU: Terminated by user
TS: Terminated by system
RP: Report

G3: Group 3
EC: Error Correct

83
029

SUBPOENA – CIVIL



IDAHO TRANSPORTATION DEPT.
3311 W. STATE ST.
BOISE, ID 83703

TELEPHONE # (208)334-8720
PO BOX 7129
BOISE, ID 83707

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE STATE
OF IDAHO IN AND FOR THE IDAHO TRANSPORTATION
DEPARTMENT

ADMINISTRATIVE HEARING

IN THE MATTER OF THE
DRIVING PRIVILEGES OF
WILKINSON, REBECCA SUSAN

SUBPOENA

THE STATE OF IDAHO TO: OFFICER GARTH DAVIS - HAILEY POLICE DEPARTMENT

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YOU WILL NEED TO PROVIDE YOUR TELEPHONE NUMBER TO THE IDAHO DEPARTMENT OF TRANSPORTATION AT (208) 334-8720, PRIOR TO THE DAY OF THE SCHEDULED HEARING.

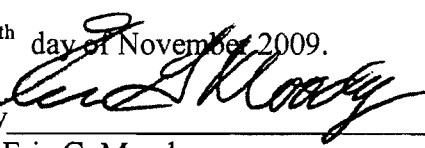
The hearing is scheduled on the 1st day of December 2009, at Two o'clock (2:00pm) **Mountain Time**.

****IF YOU ARE UNABLE TO COMPLY WITH THIS SUBPOENA, PLEASE IMMEDIATELY CONTACT MIKE AT (208) 334-8720.****

Further, prior to reporting, for your convenience you may confirm the status of your subpoena by calling the Idaho Transportation Department at (208)334-8720 before the hearing date listed above.

Witness my hand this 13th day of November 2009.

By


Eric G. Moody
Hearing Officer

Transmission Report

Date/Time
Local ID 1
Local ID 2

11-13-2009
2083322064

02:13:48 p.m.

Transmit Header Text
Local Name 1
Local Name 2



This document : Confirmed
(reduced sample and details below)
Document size : 8.5"x11"

**DRIVER SERVICES
ADMINISTRATIVE HEARING SECTION
PO BOX 7129
BOISE ID 83707
PHONE: 208 334-8720
FAX: 208 332-2002**

**ADMINISTRATIVE
HEARING SECTION**

Fax

To: Officer Garth Davis From: Mike
Fax: 208 788-6566 Date: November 13, 2009
Phone: Pages: 2
Re: CIVIL SUBPOENA REQUEST CC:
FOR WILKINSON, REBECCA
SUSAN A.L.S. HEARING

Comments:

****IMPORTANT INFORMATION****

Please note,

The ALS Hearing has been rescheduled to December 1, 2009 @ 2:00pm Mountain Time.

Thank You

Total Pages Scanned : 2

Total Pages Confirmed : 2

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
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Abbreviations:

HS: Host send
HR: Host receive
WS: Waiting send

PL: Polled local
PR: Polled remote
MS: Mailbox save

MP: Mailbox print
CP: Completed
FA: Fall

TU: Terminated by user
TS: Terminated by system
RP: Report

G3: Group 3
EC: Error Correct

85

031

SUBPOENA – CIVIL

IDAHO TRANSPORTATION DEPT.
3311 W. STATE ST.
BOISE, ID 83703

TELEPHONE # (208)334-8720
PO BOX 7129
BOISE, ID 83707

EXHIBIT

20

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE STATE
OF IDAHO IN AND FOR THE IDAHO TRANSPORTATION
DEPARTMENT

ADMINISTRATIVE HEARING

IN THE MATTER OF THE
DRIVING PRIVILEGES OF
WILKINSON, REBECCA SUSAN

SUBPOENA

THE STATE OF IDAHO TO: SGT. BRAD GELSKY, BTS - BLAINE COUNTY SHERIFF'S
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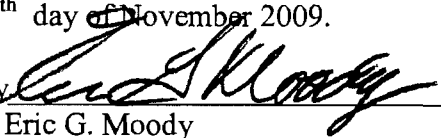
**YOU WILL NEED TO PROVIDE YOUR TELEPHONE NUMBER TO THE
IDAHO DEPARTMENT OF TRANSPORTATION AT (208) 334-8720, PRIOR
TO THE DAY OF THE SCHEDULED HEARING.**

The hearing is scheduled on the 1st day of December 2009, at Two o'clock
(2:00pm)Mountain Time.

****IF YOU ARE UNABLE TO COMPLY WITH THIS SUBPOENA,
PLEASE IMMEDIATELY CONTACT MIKE AT (208) 334-8720.****

Further, prior to reporting, for your convenience you may confirm the status of your
subpoena by calling the Idaho Transportation Department at (208)334-8720 before
the hearing date listed above.

Witness my hand this 13th day of November 2009.

By 
Eric G. Moody
Hearing Officer

86
032

Transmission Report

Date/Time
Local ID 1
Local ID 2

11-13-2009
2083322064

02:15:23 p.m.

Transmit Header Text
Local Name 1
Local Name 2

EXHIBIT

21

This document : Confirmed
(reduced sample and details below)
Document size : 8.5"x11"

DRIVER SERVICES
ADMINISTRATIVE HEARING SECTION
PO BOX 7129
BOISE ID 83707
PHONE: 208 334-8720
FAX: 208 332-2002

**ADMINISTRATIVE
HEARING SECTION**

Fax

To: Sgt. BRAD GELSKY, BTS **From:** Mike
Fax: 208 788-4105 **Date:** November 13, 2009
Phone: **Pages:** 2
Re: CIVIL SUBPOENA REQUEST **CC:**
FOR WILKINSON, REBECCA
SUSAN A.L.S. HEARING

Comments:

Please Note,

The ALS Hearing has been rescheduled to December 1, 2009 @ 2:00pm Mountain Time.

Thank You

Total Pages Scanned : 2

Total Pages Confirmed : 2

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	735	912087884105	02:14:27 p.m. 11-13-2009	00:00:20	2/2	1	EC	HS	CP21600

Abbreviations:

HS: Host send
HR: Host receive
WS: Waiting send

PL: Polled local
PR: Polled remote
MS: Mailbox save

MP: Mailbox print
CP: Completed
FA: Fail

TU: Terminated by user
TS: Terminated by system
RP: Report

G3: Group 3
EC: Error Correct

87

033



IDAHO TRANSPORTATION DEPARTMENT

Driver Services • P.O. Box 7129
Boise ID 83707-1129

10025
(208) 334-8735
dmv.idaho.gov

EXHIBIT
22

PHONE: (208) 334-8736

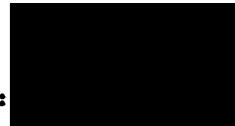
WILKINSON, REBECCA SUSAN

JANUARY 14, 2010

BOX 4976
KETCHUM

ID 83340

LIC/IDENT NO:
FILE NUMBER:
DATE OF BIRTH:



PENDING ACTION

THIS IS TO NOTIFY YOU THAT EFFECTIVE 10:04 A.M. JANUARY 14, 2010 ,
THE WITHDRAWAL PERIOD FOR:
ADMIN LIC SUSP BAC .08+/DRUGS/INTOX SUBS I.C. 18-8002A

IS TEMPORARILY STOPPED:
PENDING ADMINISTRATIVE HEARING AND HEARING OFFICERS DECISION

YOUR CLASS D DRIVING PRIVILEGES ARE CLEAR UNLESS OTHERWISE NOTIFIED.
THE ORIGINAL WITHDRAWAL DATES ARE NO LONGER VALID. IN THE EVENT THE
WITHDRAWAL IS RE-ENFORCED, CORRECTED DATES WILL BE ISSUED WITH CREDIT
GIVEN FOR ANY TIME SPENT UNDER WITHDRAWAL.

COPY

IN THE IDAHO TRANSPORTATION DEPARTMENT
STATE OF IDAHO

IN THE MATTER OF THE)	IDAHO D.L. No.FA127022G
DRIVING PRIVILEGES OF	)	FILE No. 332000025887
)	
	)	FINDINGS OF FACT AND
REBECCA SUSAN WILKINSON	)	CONCLUSIONS OF LAW AND
<hr style="width: 30%; margin-left: 0;"/>	)	ORDER

This matter came on for Administrative License Suspension (ALS) hearing on December 02, 2009, by telephone conference. Brian Elkins, Attorney at Law, represented Wilkinson.

The suspension set out in the Notice of Suspension served pursuant to Idaho Code §18-8002A* is **SUSTAINED.**

EXHIBIT LIST[†]

The hearing examiner received the following exhibits into evidence as part of the record of the proceeding:

1. Notice of suspension and temporary permit
2. Evidentiary test results
3. Sworn statement
4. Copy of petitioner's driver's license
5. Envelope from law enforcement agency
6. Certificate of receipt of law enforcement documents
7. Petitioner's hearing request
8. Petitioner's driving record
9. Response to request for discovery

10. Subpoena-duces tecum
11. Subpoena-civil
12. Subpoena-civil
13. Stay order
14. Subpoena-civil
15. Certificate of service
16. Subpoena-civil
17. Certificate of service
18. Subpoena-civil
19. Certificate of service
20. Subpoena-civil
21. Certificate of service

- A. Instrument operations logs
- B. Return of service
- C. DVD
- D. Correspondence
- E. Photo-number 1
- F. Photo-number 2
- G. Photo-number 3
- H. Photo-number 4
- I. Photo-number 5
- J. Bail bond receipt
- K. DVD
- L. Petitioner's written arguments
- M. CD-R
- N. Correspondence

**THE HEARING EXAMINER HAS TAKEN JUDICIAL NOTICE OF THE
FOLLOWING ITEMS:**

1. Records regularly maintained by ITD⁺

2. IDAPA^s Rules and manuals
3. ISP^{**} standards and procedures⁺⁺ for breath testing instruments
4. Idaho Statutes, city, and county ordinances and procedures
5. Reported Court Decisions
6. NHTSA⁺⁺ driving while impaired and SFSTs^{ss} testing manuals

ADMINISTRATIVE PROCEEDINGS^{*}**

Mr. Elkins' comments and arguments:

1. Wilkinson was not observed in compliance with the ISP Forensic Services SOP Section 3.1.
2. Evidence submitted shows Officer Davis and Wilkinson's location.
3. Exhibit 2 shows the observation period started at 2:26.
4. Exhibit 3 notes a wristwatch was used to time the observation period.
5. The record lacks how the wristwatch's time corresponds to Intoxilyzer 5000 EN's clock.
6. Considering Exhibit 2's 2:26, the fifteen-minute observation period would end at 2:41.
7. Exhibit 2 notes Wilkinson's first subject test was at 2:39.
8. Exhibit 3 provides Wilkinson's breath test results at 2:43.
9. Officer Davis used his wristwatch to establish the 2:43 time.
10. The Intoxilyzer 5000 EN displays two different subject test times.
11. It is suspicious Officer Davis noted one time for Wilkinson's two subject tests.
12. The record shows a non-compliance with the observation period.
13. Wilkinson was not closely observed.

ISSUES RAISED AT HEARING IN ADDITION TO ISSUES SET FORTH IN

IDAHO CODE §18-8002A⁺⁺⁺

1. Was Wilkinson properly monitored prior to her breath test?
2. Was Wilkinson denied access to an attorney?

FINDINGS OF FACT

I, having heard the issues raised by the driver; having considered the exhibits admitted as evidence; having considered the matter herein; and being advised in the premises and the law, make the following Findings of Fact:

PURSUANT TO IDAHO CODE §18-8002A(7) THE PETITIONER HAS THE BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE REGARDING ALL IDAHO CODE §18-8002A STANDARDS AND ALL ISSUES RAISED BY THE PETITIONER.

1.

DID OFFICER GARTH DAVIS HAVE LEGAL CAUSE TO STOP THE VEHICLE WILKINSON WAS DRIVING?

1. Officer Davis observed the vehicle driven by Wilkinson fail to maintain the vehicle's lane of travel by crossing the center and lane divider lines in violation of Idaho Code §§49-630 and 49-637.
2. Officer Davis had legal cause to stop the vehicle driven by Wilkinson.

2.

DID OFFICER DAVIS HAVE LEGAL CAUSE TO BELIEVE WILKINSON VIOLATED IDAHO CODE §18-8004?

1. Officer Davis observed Wilkinson driving a motor vehicle.
2. Wilkinson exhibited the following behaviors:
 - a. Smelled of an alcoholic beverage
 - b. Admitted to consuming alcoholic beverages
 - c. Slurred speech
 - d. Glassy eyes
 - e. Bloodshot eyes

3. Wilkinson met or exceeded the minimum decision points on the following SFSTs:
 - a. The horizontal gaze nystagmus
 - b. The 9-step walk and turn
 - c. The one leg stand
4. Officer Davis had sufficient legal cause to arrest Wilkinson and request an evidentiary test.

3.

DID THE EVIDENTIARY TEST RESULTS INDICATE A VIOLATION OF IDAHO CODE §§18-8004, 18-8004C, OR 18-8006?

1. The analyses of Wilkinson's breath samples indicated a BrAC^{***} of .165/.151.
2. Wilkinson was in violation of Idaho Code §18-8004.

4.

WAS THE EVIDENTIARY TEST PERFORMED IN COMPLIANCE WITH ALL REQUIREMENTS SET FORTH IN IDAHO CODE AND ISP FORENSIC SERVICES SOPs?

1. Officer Davis' affidavit states Wilkinson's evidentiary breath test was performed in compliance with Idaho Code and ISP Forensic Services SOPs.
2. Wilkinson's evidentiary breath test was performed in compliance with Idaho Code and ISP Forensic Services SOPs.

5.

DID THE EVIDENTIARY TESTING INSTRUMENT FUNCTION PROPERLY WHEN THE TEST WAS ADMINISTERED?

1. The evidentiary testing instrument used to test Wilkinson's breath sample completed a valid simulator solution check at 02:37 hours on October 11, 2009.

2. The valid simulator solution check approved the instrument for evidentiary testing in accordance with ISP Forensic Services SOP.
3. The evidentiary testing instrument functioned properly when the test was administered.

6.

WAS WILKINSON ADVISED OF THE POSSIBLE SUSPENSION OF HER IDAHO DRIVING PRIVILEGE?

1. Wilkinson was played the Idaho Code §§18-8002 and 18-8002A advisory recording prior to submitting to the evidentiary test.
2. Although Wilkinson was interrupted several times when she was being advised of a recording, the DVD reveals an eventual completion of the recording and Officer Davis and Wilkinson reviewing the notice of suspension form prior to Wilkinson submitting to evidentiary testing.
3. Statute and case law only provides a substantial advisement of the notice of suspension form and fails to show a violation occurs when a driver is interrupted during the reading or when the recording of the notice of suspension is being played.
4. Wilkinson was advised of the consequences of refusing or failing evidentiary testing pursuant to Idaho Code §§18-8002 and 18-8002A.

7.

WAS WILKINSON PROPERLY MONITORED PRIOR TO HER BREATH TEST?

1. Wilkinson was monitored prior to her breath test in compliance with ISP Forensic Services SOPs and Idaho Code.
2. It is noted the times in the record for the fifteen-minute observation period do not correspond to each other.
3. However, upon review of the DVD, when Officer Davis and Wilkinson are first observed entering the room up until the time Wilkinson's first subject test, the times shown on the DVD provide fifteen minutes had

elapsed prior to Wilkinson's breath test.

4. Therefore, correlating times from a wristwatch to a breath-testing instrument's clock is an irrelevant issue.
5. ISP Forensic Services SOP Section 3.1 states during *the monitoring period the subject should not be allowed to smoke, drink, eat, or belch/burp*.
6. The SOPs do not mandate the driver should be advised of what is set forth in ISP Forensic Services SOP Section 3.1.
7. Since Officer Davis did not discover any foreign material in Wilkinson's mouth there was no need to restart the fifteen-minute observation period.
8. Case law allows non-certified jail personnel to monitor a driver during the fifteen-minute observation period.
9. Wilkinson failed to submit any proof that the female jailer could not have properly observed Wilkinson and informed Officer Davis of any irregularities occurring when the jailer was patting down Wilkinson.
10. There is an allegation (appears) that Wilkinson had flicked something from her mouth during the observation period but proof by the preponderance of the evidence has not been provided into the record to support this assumption.
11. Wilkinson has provided photos and numerous sequences of times when Officer Davis was not facing Wilkinson during the observation period and the distance where Officer Davis remained during the majority of the observation period.
12. The DVD strongly shows Officer Davis having the capability in using other sensory methods during the observation period that would have detected the possibility of any actions by Wilkinson introducing any foreign matter during the observation period.
13. An opportunity existed at this ALS hearing for Officer Davis to appear by subpoena as permitted by Idaho Code §18-8002A(7).

14. Officer Davis' appearance would clarify, explain, answer questions, and provide input on how he complied with ISP Forensic Services SOPs in monitoring Wilkinson prior to her evidentiary breath test.
15. Even though the subpoena was properly served and a phone number was provided to contact Officer Davis during the ALS hearing, shortly prior to Wilkinson's ALS hearing a request was made in not having Officer Davis appear.
16. Wilkinson attempting to interpret her provided evidence to meet her burden of proof is not sufficient to overcome Officer Davis' standard (boiler point) language provided in Exhibit 3.
17. Furthermore, no local case law has been provided in showing the method used to observe drivers at the Blaine County Jail or Officer Davis violates the fifteen-minute observation period.
18. Upon review of Exhibit 2 Wilkinson's two subject tests differed by 0.014 and were within ISP Forensic Services SOP Sections 3.2 and 3.2.3 requirements.
20. Exhibit 2's BrAC results strongly refute the possibility of an improper fifteen-minute observation period occurred before Wilkinson was administered an evidentiary breath test
21. The record as submitted demonstrates a compliance with ISP Forensic Services SOPs in properly monitoring and observing Wilkinson prior to Wilkinson's evidentiary breath test.

8.

WAS WILKINSON DENIED ACCESS TO AN ATTORNEY?

1. Statute specifically sets forth a driver does not have a right to an attorney prior to any evidentiary testing.
2. The notice of suspension in section 1 had informed Wilkinson of this denial of an attorney prior to evidentiary testing.
3. The DVD also shows Officer Davis explaining to Wilkinson that she does not have a right to an attorney prior to evidentiary testing.

4. Wilkinson has not submitted any proof in showing a request to contact her attorney was made after her evidentiary breath test.
5. Likewise, it reasonable to deduce that Officer Davis or a jailer did offer an opportunity for Wilkinson to call an attorney after Wilkinson's evidentiary breath test.
6. It appears if Wilkinson was able to call a bondsman, Wilkinson had the same chance to call an attorney.
7. Wilkinson failed to meet her burden in showing she was denied access to an attorney after failing an evidentiary breath test.

CONCLUSION OF LAW

CONFLICTING FACTS, IF ANY, WERE CONSIDERED AND REJECTED IN FAVOR OF THE FOREGOING CITED FACTS. BASED UPON THE FOREGOING FINDINGS OF FACT, I CONCLUDE THAT ALL OF THE REQUIREMENTS FOR SUSPENSION OF THE PETITIONER'S DRIVING PRIVILEGES SET FORTH IN IDAHO CODE §§18-8002 AND 18-8002A WERE COMPLIED WITH IN THIS CASE.

THE FOLLOWING ORDER IS RENDERED:

ORDER

THE STAY ORDER IS HEREBY QUASHED AND THE SUSPENSION SET FORTH IN THE NOTICE OF SUSPENSION FOR FAILURE OF EVIDENTIARY TESTING SERVED BY OFFICER DAVIS ON OCTOBER 11, 2009, SHALL BE REINSTATED FOR 90 DAYS COMMENCING ON DECEMBER 28, 2009, AND REMAIN IN EFFECT THROUGH MARCH 28, 2010.

DATED this 17th day of December 2009

A handwritten signature in black ink, appearing to read "Eric G. Moody". The signature is fluid and cursive, with the first name "Eric" and last name "Moody" clearly distinguishable.

Eric G. Moody

ADMINISTRATIVE HEARING EXAMINER

Endnotes

* Idaho's Implied Consent Statute

† Idaho Transportation Department's (ITD hereafter) exhibits are numeric, Petitioner's exhibits are alpha

† Idaho Transportation Department

§ Idaho's Administrative Procedure Act

** Idaho State Police

†† Hereafter SOPs

†† National Highway Transportation Safety Administration

§§ Standardized field sobriety tests

*** Argument and testimony is summarized from record of hearing

††† Issues addressed under Idaho Code §18-8002A(7) will not be repeated under Petitioner's issues

+++ Breath Alcohol Concentration

FINAL ORDER

(Hearings pursuant to section 18-8002A, I.C.)

This is a final order of the Department.

A motion for reconsideration may be filed with the Idaho Transportation Department's Administrative License Suspension Hearing Unit, PO Box 7129, Boise, ID 83707-1129 within fourteen (14) days of the issue date of this order. If the hearing officer fails to act upon this motion within twenty-one (21) days of its receipt, the motion will be deemed denied.

Or, pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition for judicial review in the district court of the county in which:

1. A hearing was held;
2. The final agency actions were taken; or
3. The party seeking review of the order resides.

An appeal must be filed within twenty-eight (28) days of the issue date of this final order. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 18th day of December 2009, I mailed a true and accurate copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER by depositing the same in the United States mail, postage prepaid, addressed to:

Brian E. Elkins
Attorney at Law
PO Box 766
Ketchum, Idaho 83340

Michael P. [Signature]

EXHIBIT

A

INSTRUMENT SERIAL NUMBER:

68-013466

INSTRUMENT OPERATIONS LOG

LOI

LOI

DATE	TIME	SUBJECT'S NAME	SUBJECT TEST RESULTS	OPERATOR'S NAME	CALIBRATION CHECK RESULTS	SIM IN F
		Lot Bottle				
9-25-09	17:15	09102 0803	—	Gelskey	.204/.206	
9-25-09	17:15	09102 0803	.202/.204	Gelskey	—	
9-25-09	17:50	09802 1006	—	Gelskey	.086/.086	
9-25-09	17:50	09802 1006	—	Gelskey	—	
9-25-09	18:10	09802 1006	.084/.084	Gelskey	—	
9-27-09	0207	Fernando Chavez-Cineros	.155/.154	Davis/110	.083	
9-30-09	0157	Nelson, Louis	.000/.000	Beane	.084	
10-1-09		Sutcliffe, W	.000/.000	Young	.084	
10-06-09	2308	Harding, Daniel	.122/.121	R. Ornelas	.084	
10-7-09	00:53	Hyde, Kelly	.087/.085	MORELAND	.084	✓
10-9-09	19:26	Kaiser, Rudolf	.000/.000	Ojeda	.083	✓
10-11-09	0226	Wilkinson, Rebecca	.165/.151	G. Davis/110	.083	✓
10-17-09	0009	Poncebosa, Gensala	.195/.185	R. Ornelas	.083	✓
10-19-09	19:29	Decker, Kimberlee	.000/.000	C. CASTLE	.083	-
10-19-09	19:50	Berning, Steve		C. CASTLE	.083	.
10-20-09		Mendoza, Aaron, Jr	.161/.153	R. RODRIGUEZ	.083	
10-22-09	18:54	Doyle, Kevin	1	R. RODRIGUEZ	.082	✓
10-23-09		Cincotta, Barrett	00/00	Bause	.082	✓

Oct 27 2008 12:32AM Blaine County Sheriff

INSTRUMENT SERIAL NUMBER: 68-013466

LOT 1

LOCA

[illegible]

Oct 27 2009 12:32AM Blaine County Sheriff

103

OCT-23-2009 FRI 02:29 PM ROGER CRIST/BRIAN ELKINS

FAX NO. 12087268328

P. 02/02

2083322064

07:13:06 a.m. 10-23-2009

2/2

SUBPOENA - CIVIL

IDAHO TRANSPORTATION DEPT.
3311 W. STATE ST.
BOISE, ID 83703

TELEPHONE # (208)332-2005
PO BOX 7129
BOISE, ID 83707

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE STATE OF IDAHO IN AND FOR THE IDAHO
TRANSPORTATION DEPARTMENT

ADMINISTRATIVE HEARING

IN THE MATTER OF THE
DRIVING PRIVILEGES OF
WILKINSON, REBECCA SUSAN

SUBPOENA DUCES TECUM

THE STATE OF IDAHO TO: EVIDENCE CUSTODIAN - BLAINE COUNTY SHERIFF'S OFFICE

You are hereby commanded to produce evidence for an Administrative Hearing before the
Idaho Transportation Department.

You are commanded to provide the following items and documents:

One copy of the CALIBRATION RECORDS AND INSTRUMENT OPERATION LOGSHEETS for Intoxilyzer 5000EN
SN #68-013466 for the period of September 11, 2009 thru October 12, 2009, showing the .08 and .20 calibration checks
with the corresponding Simulator Solution Lot changes.

THE SUBPOENAED MATERIAL MUST BE RECEIVED BY November 5, 2009.

Notice To Party To Whom This Subpoena is Directed: This subpoena is issued upon the
condition that the requesting party, Attorney Brian Elkins, Phone #208 726-4338 shall advance the reasonable cost of
producing the books, papers, documents, or tangible things, to the agency providing the evidence.

****IF YOU ARE UNABLE TO COMPLY WITH THIS SUBPOENA, PLEASE IMMEDIATELY CONTACT
Mike AT (208) 334-8720.****

Subpoenaed material must be sent via U.S. Mail or Fax to:

Idaho Transportation Department

A.J.S. Hearing Unit

Att: **Mike**

PO Box 7129

Boise ID 83707-1129

FAX #208 332-2002

This subpoena has been issued in compliance with IDAPA rule 39.02.72.100.01

If you have any questions regarding this subpoena you can contact **Mike** at 334-**8720**

Witness my hand this 23rd day of October 2009.

By


Eric G. Moody
Hearing Officer

*****This subpoena is a single page document. Any additional documents requesting evidence
attached to this subpoena have NOT been approved by the Hearing Examiner and should not be
considered by the recipient of this subpoena.*****

104
050

EXHIBIT

B

BRIAN E. ELKINS, P.C.
 Attorney at Law
 208 Spruce Avenue N.
 P. O. Box 766
 Ketchum, ID 83340
 Telephone: (208) 726-4338
 Facsimile: (208) 726-9328
 Email: beelkins@cox.net
 Idaho State Bar No. 3150

Attorney for Petitioner

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE STATE
 OF IDAHO IN AND FOR THE IDAHO TRANSPORTATION DEPARTMENT
 ALS HEARING SECTION

IN THE MATTER OF THE)
 DRIVING PRIVILEGES OF)
 REBECCA S. WILKINSON,)

Petitioner)

File No. [REDACTED]

RETURN OF SERVICE

State of Idaho)
) ss.
 County of Blaine)

I, Melissa Roemer, being first sworn upon oath, hereby state that I am not a party to the above entitled action and on the 23rd day of October, 2009, I received the subpoena attached hereto and personally served copies thereof on Garth Davis of the Hailey Police Department who is a person over the age of eighteen, residing in Blaine County, Idaho.

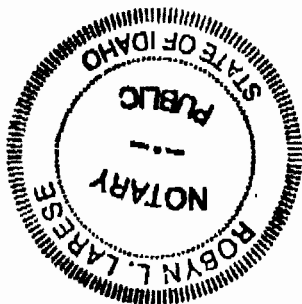
Said service was completed in Blaine County on the 23 day of October, 2009, at the hour of 9:45 PM at 113 So. Main St. Hailey ID 83333

DATED this 26 day of October, 2009.

Melissa Roemer
 Melissa Roemer

On this 26th day of October, 2009, before me, the undersigned notary public in and for said State, personally appeared MELISSA ROEMER, known to me or proven to me to be the person whose name is subscribed to the within instrument and acknowledged that she executed the same.

IN WITNESS WHEREOF I HEREUNTO AFFIX MY HAND AND OFFICIAL SEAL.



Robyn L. Larese
Notary Public for Idaho

Residing at:

Comm. expires:

Boise, ID.
4/20/2013

SUBPOENA – CIVIL

IDAHO TRANSPORTATION DEPT.
3311 W. STATE ST.
BOISE, ID 83703

TELEPHONE # (208)334-8720
PO BOX 7129
BOISE, ID 83707

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE STATE
OF IDAHO IN AND FOR THE IDAHO TRANSPORTATION
DEPARTMENT

ADMINISTRATIVE HEARING

IN THE MATTER OF THE
DRIVING PRIVILEGES OF
WILKINSON, REBECCA SUSAN

SUBPOENA

THE STATE OF IDAHO TO: OFFICER GARTH DAVIS - HAILEY POLICE DEPARTMENT

You are hereby commanded to appear before Hearing Officer Eric G. Moody of the Idaho Transportation Department, as a witness in the above-entitled action, by means of a telephone conference call.

**YOU WILL NEED TO PROVIDE YOUR TELEPHONE NUMBER TO THE
IDAHO DEPARTMENT OF TRANSPORTATION AT (208) 334-8720, PRIOR
TO THE DAY OF THE SCHEDULED HEARING.**

The hearing is scheduled on the 3rd day of November 2009, at Nine o'clock
(9:00am) Mountain Time.

****IF YOU ARE UNABLE TO COMPLY WITH THIS SUBPOENA,
PLEASE IMMEDIATELY CONTACT MIKE AT (208) 334-8720.****

Further, prior to reporting, for your convenience you may confirm the status of your subpoena by calling the Idaho Transportation Department at (208)332-2005 before the hearing date listed above.

Witness my hand this 23rd day of October 2009.

By


Eric G. Moody
Hearing Officer

BRIAN E. ELKINS, P.C.
 Attorney at Law
 208 Spruce Avenue N.
 P. O. Box 766
 Ketchum, ID 83340
 Telephone: (208) 726-4338
 Facsimile: (208) 726-9328
 Email: beelkins@cox.net
 Idaho State Bar No. 3150

Attorney for Petitioner

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE STATE
 OF IDAHO IN AND FOR THE IDAHO TRANSPORTATION DEPARTMENT
 ALS HEARING SECTION

IN THE MATTER OF THE)	
DRIVING PRIVILEGES OF	)	DL#FA127022G
REBECCA S. WILKINSON,	)	File No.
)	
Petitioner	)	RETURN OF SERVICE
)	
)	

State of Idaho)
) ss.
 County of Blaine)

I, Melissa Roemer, being first sworn upon oath, hereby state that I am not a party to the above entitled action and on the 23rd day of October, 2009, I received the subpoena and subpoena duces tecum attached hereto and personally served copies thereof on Brad Gelsky of the Blaine County Sheriff's Department who is a person over the age of eighteen, residing in Blaine County, Idaho.

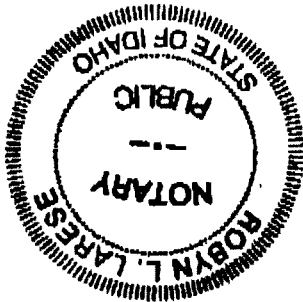
Said service was completed in Blaine County on the 25 day of October, 2009,
 at the hour of 4:30pm at 1650 Aviation Way, Hailey, ID 83333

DATED this 26 day of October, 2009.

Melissa Roemer
 Melissa Roemer

On this 26 day of October, 2009, before me, the undersigned notary public in and for said State, personally appeared MELISSA ROEMER, known to me or proven to me to be the person whose name is subscribed to the within instrument and acknowledged that she executed the same.

IN WITNESS WHEREOF I HEREUNTO AFFIX MY HAND AND OFFICIAL SEAL.



Robyn L. LaRue
Notary Public for Idaho
Residing at: Hailey, ID
Comm. expires: 4/30/2013

SUBPOENA - CIVIL

IDAHO TRANSPORTATION DEPT.
3311 W. STATE ST.
BOISE, ID 83703

TELEPHONE # (208)334-8720
PO BOX 7129
BOISE, ID 83707

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE STATE
OF IDAHO IN AND FOR THE IDAHO TRANSPORTATION
DEPARTMENT

ADMINISTRATIVE HEARING

IN THE MATTER OF THE
DRIVING PRIVILEGES OF
WILKINSON, REBECCA SUSAN

SUBPOENA

THE STATE OF IDAHO TO: SGT BRAD GELSKY, BTS - BLAINE COUNTY SHERIFF'S
OFFICE

You are hereby commanded to appear before Hearing Officer Eric G. Moody of the
Idaho Transportation Department, as a witness in the above-entitled action, by means of a
telephone conference call.

**YOU WILL NEED TO PROVIDE YOUR TELEPHONE NUMBER TO THE
IDAHO DEPARTMENT OF TRANSPORTATION AT (208) 334-8720, PRIOR
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Further, prior to reporting, for your convenience you may confirm the status of your
subpoena by calling the Idaho Transportation Department at (208)332-2005 before
the hearing date listed above.

Witness my hand this 23rd day of October 2009.

By


Eric G. Moody
Hearing Officer

2083322064

07:13:08 a.m.

10-23-2009

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SUBPOENA - CIVIL

IDAHO TRANSPORTATION DEPT.
3311 W. STATE ST.
BOISE, ID 83703

TELEPHONE # (208)332-2005
PO BOX 7129
BOISE, ID 83707

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE STATE OF IDAHO IN AND FOR THE IDAHO
TRANSPORTATION DEPARTMENT

ADMINISTRATIVE HEARING

IN THE MATTER OF THE
DRIVING PRIVILEGES OF

SUBPOENA DUCES TECUM

WILKINSON, REBECCA SUSAN

THE STATE OF IDAHO TO: EVIDENCE CUSTODIAN - BLAINE COUNTY SHERIFF'S OFFICE

You are hereby commanded to produce evidence for an Administrative Hearing before the
Idaho Transportation Department.

You are commanded to provide the following items and documents:

One copy of the CALIBRATION RECORDS AND INSTRUMENT OPERATION LOGSHEETS for Intoxilyzer 5000EN
SN #68-013466 for the period of September 11, 2009 thru October 12, 2009, showing the .08 and .20 calibration checks
with the corresponding Simulator Solution Lot changes.

THE SUBPOENAED MATERIAL MUST BE RECEIVED BY November 5, 2009.

Notice To Party To Whom This Subpoena is Directed: This subpoena is issued upon the
condition that the requesting party, Attorney Brian Elkins, Phone #208 726-4338 shall advance the reasonable cost of
producing the books, papers, documents, or tangible things, to the agency providing the evidence.

****IF YOU ARE UNABLE TO COMPLY WITH THIS SUBPOENA, PLEASE IMMEDIATELY CONTACT
Mike AT (208) 334-8720.****

Subpoenaed material must be sent via U.S. Mail or Fax to:

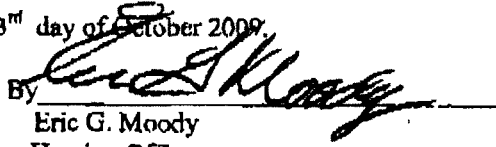
Idaho Transportation Department
A.L.S. Hearing Unit
Att: Mike
PO Box 7129
Boise ID 83707-1129
FAX #208 332-2002

This subpoena has been issued in compliance with IDAPA rule 39.02.72.300.01

If you have any questions regarding this subpoena you can contact Mike at 334-8720

Witness my hand this 23rd day of October 2009

By


Eric G. Moody
Hearing Officer

*****This subpoena is a single page document. Any additional documents requesting evidence
attached to this subpoena have NOT been approved by the Hearing Examiner and should not be
considered by the recipient of this subpoena.*****

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Transmittal

S H E E T

To: Idaho Transportation Department, via facimile: 1-208-332-2002

Subject: *In the Matter of the Driving Privileges of Rebecca S. Wilkinson*
DLHFA127022G

Date: November 3, 2009

Faxed herewith for filing in the above referenced matter please find:

- (1) Return of Service of Subpocna for Garth Davis; and
- (2) Return of Service of Subpoena and Subpoena *Duces Tecum* for Brad Gelskey.

Thank you.

From the desk of...

Brian E. Elkins
Attorney at Law
208 Spruce Avenue North
Post Office Box 766
Ketchum, ID 83340

Telephone 208-726-4338
Fax: 208-726-9328

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BRIAN E. ELKINS

ATTORNEY AT LAW
A PROFESSIONAL CORPORATION

EXHIB

D

BITTERROOT SQUARE PROFESSIONAL BUILDING
208 SPRUCE AVENUE NORTH
P.O. BOX 766
KETCHUM, IDAHO 83340

TELEPHONE (208) 726-4338
FACSIMILE (208) 726-9328
E-MAIL: beelkins@cox.net

December 8, 2009

Eric G. Moody, Hearing Officer
Idaho Transportation Department
ALS Hearing Section
P. O. Box 7129
Boise, ID 83707-1129

Re: *In the Matter of the Driving Privileges of Rebecca S. Wilkinson*
License/Identification No. FA127022G
Your File No. 332000025887

Dear Eric:

Consistent with our telephone discussions during the scheduled ALS hearing on December 1, 2009 at 2:00 p.m., I enclose another CD (to replace the first one I sent you) that is marked "Wilkinson DUI Arrest 10/11/09 2:28 AM - 2:55 AM Garth Davis." For some reason, the original that I received from Lt. Jay Davis of the Blaine County Sheriff's Department notes towards the bottom of the CD "(Di Bos)" and I have included that as well on the one that is enclosed herewith.

Prior to sending this CD to you I confirmed that it contains the files and the video recording. Please refer to my earlier letter to you dated November 20, 2009 on how to go about downloading the program player which is called "Archive Player." At least on my computer, once I load the CD into the player, a window automatically opens up showing "Video D." There are three files, the middle of which is the Archive Player setup and that's the one that you need to open up to download the Archive Player. Once the program is downloaded, then you close it and go to your Start button and you will see Archive Player downloaded into your programs. That is where you want to open Archive Player and go to the D drive and then click on the upper lefthand window on 2009_10_1102_28.23.info. Doubleclick on that file and it will start playing the video taken from the Blaine County Intox room. Please advise if you are unable to get the video to play on your computer.

I also enclose five 8 ½ x 11 color pictures of various reference points in the Blaine County Intox room and, for the sake of clarity, I have marked them as Defendant's Exhibits 1 through 5 on the

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Eric Moody
December 8, 2009
Page 2

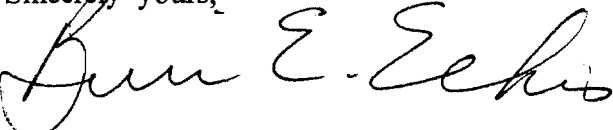
back of the photographs in the event your office places other exhibit numbers or letters on the front, which I will not be privy to when drafting the Petitioner's Written Argument. When we discussed this matter during the ALS hearing on December 1, 2009 you did not know for sure how these pictures would be marked since your office staff marks them in as exhibits upon receipt. Defendant's Exhibits 3 through 5 show, *inter alia*, a measuring tape on the floor from the corner where Officer Garth Davis was standing throughout most of the proceedings prior to Ms. Wilkinson's submission to the breath test. Defendant's Exhibit 5 shows that the distance from the corner where Ms. Wilkinson was patted down by the female jailer to the corner where Officer Davis was doing his paperwork is 18 feet. I took these photographs and verify the distance is 18 feet.

I also enclose a Bail Bond Deposit showing Rebecca Wilkinson was released from jail at 4:03 a.m.

In any event, I enclose the Petitioner's Written Argument that further incorporates these documents with the CD video along with supporting case law. Please mark these items in as Petitioner's Exhibits.

Please feel free to contact me if you have any questions or if I can be of further assistance. Unless otherwise notified by you, I will now assume that you will be able to open and review the video CD of the Intox room.

Sincerely yours,



Brian E. Elkins

BEE:cc
Enclosures
pc: Rebecca Wilkinson

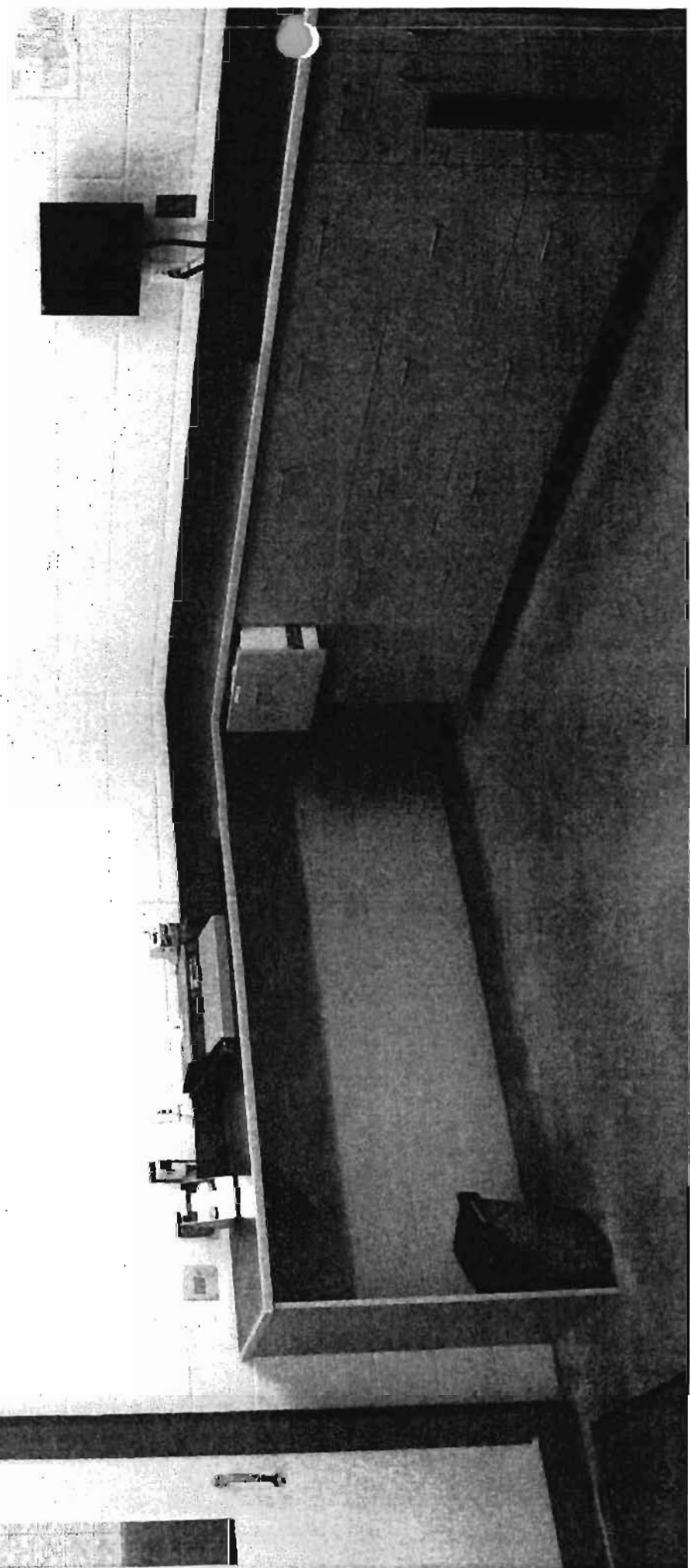
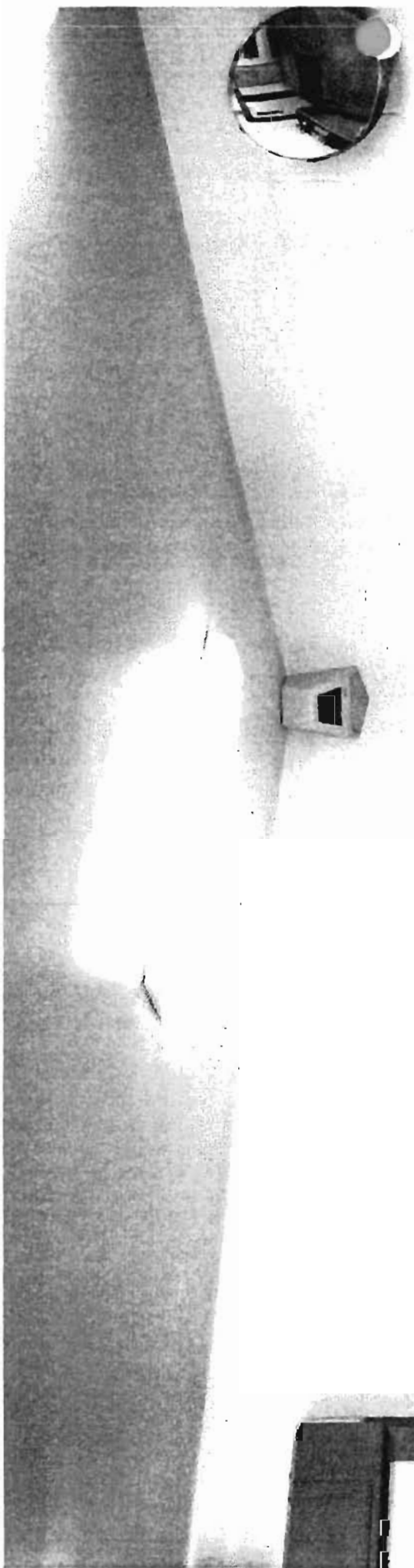
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SLIDER 1

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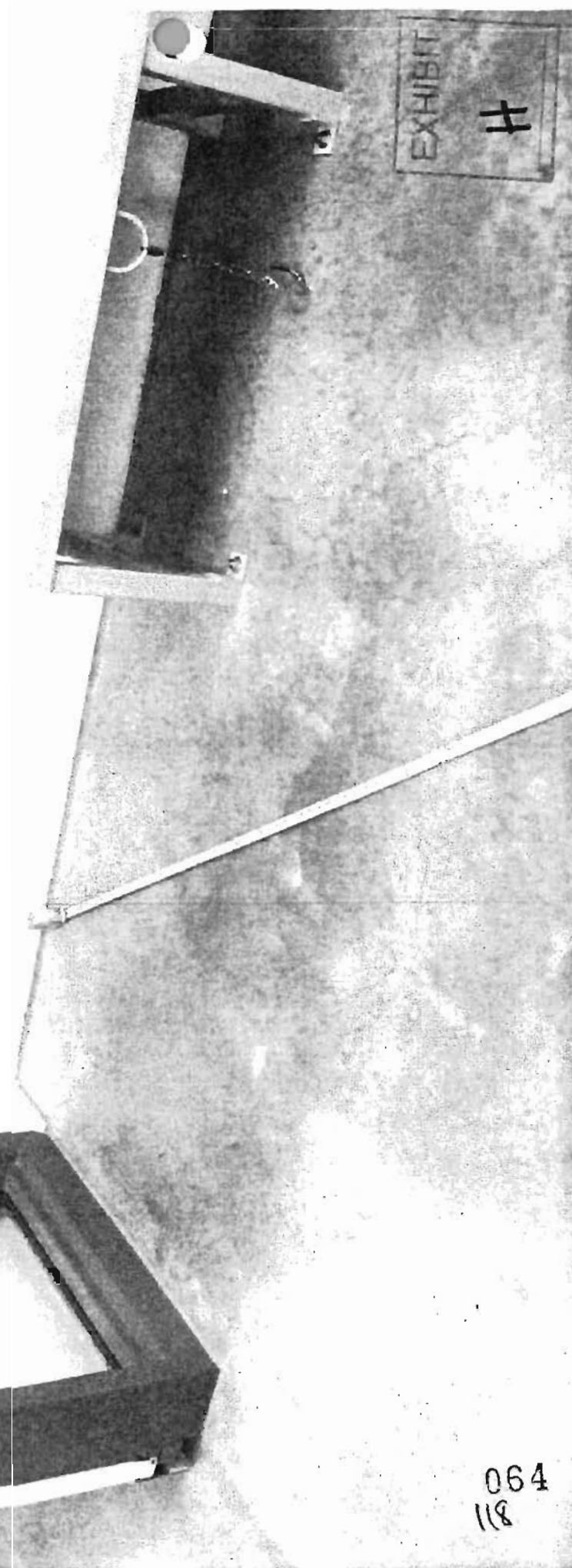
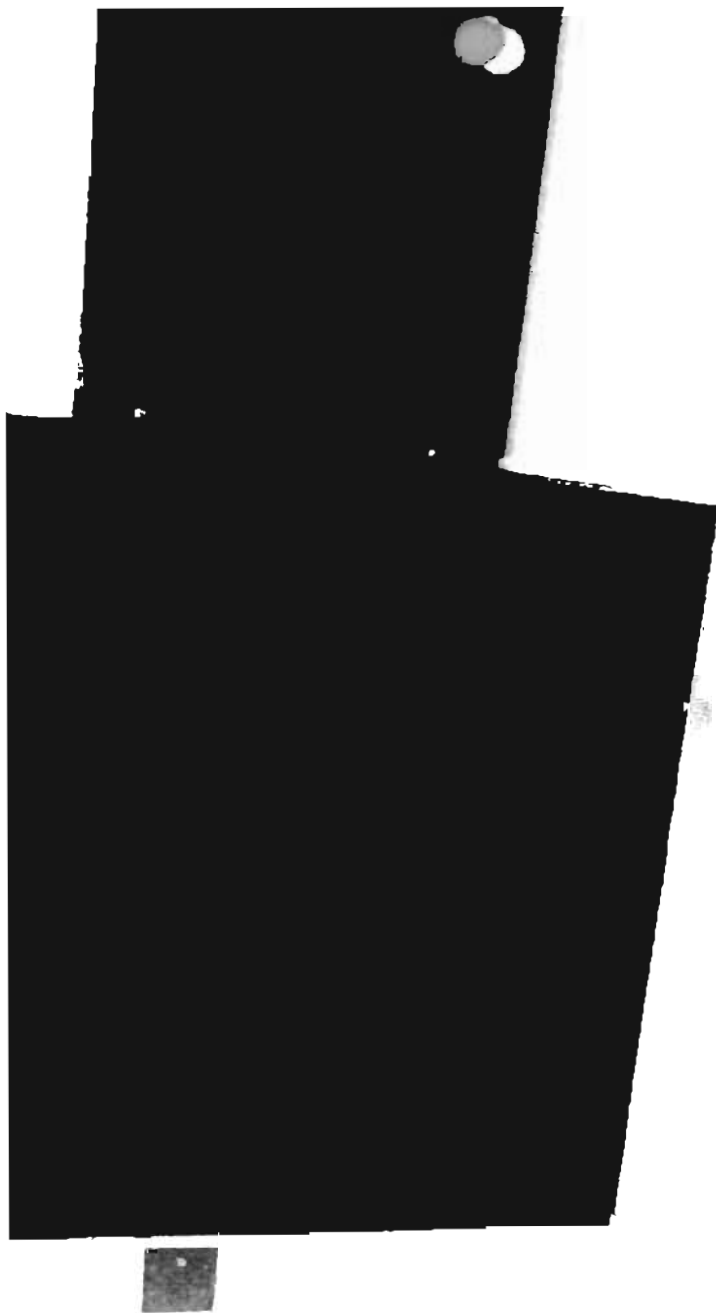


EXHIBIT

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EXHIBIT

I

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BLAINE COUNTY SHERIFF'S DEPARTMENT

BAIL BOND RECEIPT/AR #: 27924

BOND PAID BY: CRISMAN, STEPHEN ADDRESS: PO BOX 2249 KETCHUM, ID 83340

Name of Person being bonded out: WILKINSON, REBECCA SUSAN

Charges against above person: DUI 18-8004 Warrant #:

Amount of bond: \$500.00

HOW PAID: ☐ OR'd ☒ Cash ☐ Check ☐ Money Order ☐ Surety
Other

BOND ACCEPTED BY: 269 DATE ACCEPTED: 10/11/2009

STATE OF IDAHO,

)
Plaintiff,)

vs.)

BAIL BOND DEPOSIT

WILKINSON, REBECCA SUSAN ,)

)
Defendant.)

I the undersigned, tender herewith the sum of \$500.00 Represented by
☐ OR'd ☒ Cash ☐ Check ☐ Money Order ☐ Surety
Other the same to be used as bail bond for the above name defendant.

In the event said defendant is found guilty of the charge for which this bond is posted, then this bond or so much thereof as is necessary, may be used to pay the fine imposed for such violation, but in the event said bond is exonerated, the same shall be repaid to: CRISMAN, STEPHEN whose address is: PO BOX 2249 KETCHUM, ID 83340.

DATE TO APPEAR 10/26/09 SIGNATURE _____

ADVISEMENT OF CONDITIONAL RELEASE AND APPEARANCE DATE

I understand that in the event I am released on bond or on my own recognizance and promise to appear that I will be required to appear in the Magistrate Court in Blaine County, Hailey, Idaho or at the following location:

on the 26th day of OCTOBER, 2009 , at 09:00 a.m. (or ☐ a.m./☐ p.m.).

☐ TO MAINTAIN CONTACT WITH ATTORNEY AND/OR COURT FOR FUTURE APPEARANCE DATE.

I also understand that in the event that I fail to appear at the aforementioned time, my bail can be forfeited and I can be re-arrested and charged with the offense of Bail Jumping, as that offense is defined by I.C. 18-7401:

A person set at liberty by Court Order with or without bail, upon condition that he will subsequently appear at a specific time and place, commits a misdemeanor if, without lawful excuse, he fails to appear at that time and place. The offense constitutes a felony where the required appearance was to answer to a charge, and the charge of felony, or for disposition of any such charge, and the actor to flight or went into hiding to avoid apprehension, trial or punishment. This section does not apply to obligations to appear incident to release under suspended sentence or on probation or parole.

WITNESS: _____
DATE: 10/11/2009

SIGNATURE: _____
TIME: 4:03 AM Hours

I HEREBY ORDER that the release of all persons arrested in Blaine County is conditioned upon the proper execution of the above acknowledgment and appearance at all hearings scheduled in this matter.

DATED APPROVED: July 27, 2004

Signature on file _____
Robert James Elgee, District Judge

EXHIBIT
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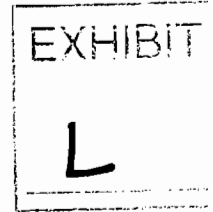
Brian E. Elkins
Attorney at Law
P.O. Box 766
Ketchum, Idaho 83340

ERIC G. MOODY, HEARING OFFICER
ALS DIVISION
IDAHO TRANSPORTATION DEPT
P. O. BOX 7129
BOISE, ID 83707-1129



ITD RECD DEC 11 2009

BRIAN E. ELKINS, P.C.
Attorney at Law
208 Spruce Avenue North
P. O. Box 766
Ketchum, ID 83340
Telephone: (208) 726-4338
Facsimile: (208) 726-9328
E-mail: beelkins@cox.net
Idaho State Bar No. 3150



Attorney for Petitioner

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE
STATE OF IDAHO IN AND FOR THE IDAHO TRANSPORTATION DEPARTMENT

IN THE MATTER OF THE)	
SUSPENSION OF THE DRIVER'S	)	License/Identification No. [REDACTED]
LICENSE OF	)	File Number: 332000025887
)	
REBECCA S. WILKINSON,	)	PETITIONER'S WRITTEN
	)	ARGUMENT IN SUPPORT OF
Petitioner.	)	VACATING SUSPENSION
)	
)	

I. BACKGROUND

An Administrative License Suspension proceeding under Idaho Code § 18-8002A ("ALS") was timely requested by the Petitioner and was set for an ALS hearing on December 1, 2009 before ALS Hearing Officer Eric Moody. At that time, on the record, counsel for the Petitioner requested that the record remain open for 15 days to supply five photographs, any other documentary evidence that is discovered, and another CD which contains a video of the events that took place in what is referred to as the "Intox room" at the Blaine County Sheriff's Department when the Petitioner was brought into that room by the arresting officer, Garth Davis of the Hailey Police Department. The Petitioner was arrested for driving while under the

influence of alcohol on October 11, 2009 and was subsequently requested by the officer to submit to a test to determine alcohol concentration on an Intoxilyzer 5000EN breath testing machine located in the Intox room. See, Exhibit 2 which is the print card verifying that this breath testing machine was an Intoxilyzer 5000EN.

Counsel for the Petitioner requested an opportunity to submit a written argument since, at the time scheduled for the ALS hearing on December 1, 2009, the hearing officer was unable to open a CD that had previously been supplied by counsel for the Petitioner nor did the hearing examiner have the pictures of the Intox room that have now been admitted into the record. Since the hearing examiner and counsel for the Petitioner did not know how these exhibits would be marked by the ALS Hearing Section as exhibits, for the sake of clarity in preparing this written argument counsel for the Petitioner has marked the photographs on the back as Defendant's Exhibits 1 through 5 with the understanding that the ALS Hearing Section may mark them as exhibits with letters on the front of the photographs once they are received by the ALS Hearing Section.

The primary issue that arises from the record is whether the arresting officer complied with the 15-minute pre-test monitoring period by either (1) did he wait the 15 minutes before the BrAC test and/or (2) did he properly observe/monitor Ms. Wilkinson prior to the test. Another issue is what are the consequences of Ms. Wilkinson's repeated requests to call a lawyer. The following is the argument that supports the Petitioner's position that the ALS suspension should be vacated.

II. ARGUMENT

As recently reviewed by the Idaho Court of Appeals *In Re Schroeder*, 147 Idaho 476, 210 P.3d 584 (Ct. App. 2009), an ALS hearing officer must vacate an ALS suspension that is provided in I. C. § 18-8002A(4) if the driver shows, to a preponderance of the evidence, that one of the grounds enumerated in § 18-8002A(7) has been shown. "These grounds include a finding that the alcohol concentration test was not conducted by a method that has been approved by the Idaho State Police ("ISP") pursuant to I. C. § 18-8004(4). See, I. C. § 18-8002A(7)(d)." *In Re Schroeder*, 147 Idaho at 477. The ISP has been given the responsibility to promulgate regulations for the administration of breath alcohol tests which it has done, along with its

predecessors, through standard operating procedures and manuals. *Id.* As noted above, and as depicted in Exhibit 2, this case involves an Intoxilyzer 5000EN and, thus, it is appropriate to consult those manuals for proper operating procedures. According to the Intoxilyzer 5000 - Operator's Training Manual (March 2007) (hereinafter referred to as the "Manual"), page 8 sets forth the requirements and procedures for the "15-minute waiting period."

Monitor the subject for 15 minutes. During this time, the subject may not smoke, consume alcohol, eat, belch, vomit, use chewing tobacco, or have gum or candy in the mouth. If belching or vomiting does occur or something is found in the mouth, have it removed and wait an additional 15 minutes.

OPERATING PROCEDURE FOR A BREATH TEST:

Observe subject for 15 minutes.

* * *

(Emphasis in bold in the original; emphasis in italics added.)

In addition to the Manual, the ISP has also promulgated a "Standard Operating Procedure - Breath Alcohol Testing (Revised 7/7/2009) ("SOP") which has similar language and is set forth in paragraph 3.2, page 6, which reads: "**Prior to evidential breath alcohol testing**, the subject **must be monitored for fifteen (15) minutes**. Any material which absorbs/adsorbs or traps alcohol should be removed from the mouth prior to the 15 minute waiting period. . . ."

(Emphasis in the original in bold; emphasis in italics added.) In paragraph 3.1.5 of the SOP the operator, during the monitoring period, is directed and required to "be *alert* for any event that might influence the accuracy of the breath test." Also, in the next paragraph 3.1.5.1 and 3.1.5.2, the operator is again, with mandatory language (these paragraphs use the word "must") required to be "aware" of any event that might induce the presence of mouth alcohol or the suspect putting something in his mouth. As paragraph 3.1.5.2 puts it: "[i]f, during the 15-minute waiting period, the subject vomits or is otherwise suspected of regurgitating material from the stomach, the 15-minute waiting period **must** begin again." (Emphasis added.)

What all of this means is that the operator of the Intoxilyzer 5000EN is required to closely observe and monitor the suspect and be alert for any events that may occur which could induce either an object into the suspect's mouth or a burp or regurgitation. All of this necessarily implies that Officer Garth Davis is required to keep, at a minimum, the Petitioner in his peripheral vision (he needs to *see* the suspect in order to "observe" her) and at a distance where

he can hear a burp or regurgitation or any event that could induce something into, or from, the Petitioner's mouth.

The case law in Idaho is clear that the operator is not required to "stare fixedly" at the suspect and the operator is allowed to go about preparing reports and inputting data into the Intox machine but, no doubt, the distance between the operator and the suspect become a factor, the noise level in the room, whether the operator keeps the suspect in his peripheral vision and whether the operator is being distracted by other tasks at hand or other events in the Intox room.

In *State v. Remsburg*, 126 Idaho 338, 882 P.2d 993 (Ct. App. 1994), the court analyzed language from an operator's training manual for the Intoximeter 3000 - the predecessor to the Intoxilyzer 5000EN. However, the court looked at similar language in the Intoximeter 3000 manual as we now find in the Manual for the Intoxilyzer 5000EN. The manual for the Intoximeter 3000, according to *Remsburg*, provides: "Observe the subject closely for 15 minutes. During this time, the subject may not smoke, consume alcohol, belch, vomit, use chewing tobacco, or have any other foreign substance in his mouth." *Id.* 126 Idaho at 339.

Remsburg also held that the 15-minute observation period "*must* occur immediately prior to the administration of the test." *Id.* 126 Idaho at 340. However, the manual is silent as to how close the officer is required to be to the suspect and how he is to monitor or observe the suspect.

In *State v. Utz*, 125 Idaho 127, 867 P.2d 1001 (Ct. App. 1993), the Court of Appeals held that an officer who had left the "area"¹ in which a subject was being detained could not closely observe the subject for the requisite time period. In *Remsburg*, the Court of Appeals found that the officer had complied with the pre-test monitoring period while the officer read the advisory form and programmed the Intoximeter for the breath test sequence. The court did not require that the officer "unswervingly observe" or "stare fixedly" at the suspect. Some of the important facts in *Remsburg* were that the officer was "seated next" to the suspect² and the officer testified that

¹The officer in *Utz* did not leave the room where the suspect was being held: he just left the "area." Thus, it is not required that an operator leave the room where the suspect is being detained in order to make a finding that the 15-minute observation period was violated: only the area where the suspect is being held.

²See, *State v. Remsburg*, 126 Idaho at 339.

he observed Remsburg for at least 15 minutes prior to submitting to the test and that she did not burp, belch or vomit.

A close study of *Rensburg*, *Utz*, and *State v. Carson*, 133 Idaho 451, 988 P.2d 225 (Ct. App. 1999) (*Carson* will be discussed further below), it is important that the officer keep the suspect, at a minimum, in the officer's peripheral view.³ Because the court in *Rensburg* clearly emphasized, and rejected, a finding made by the magistrate where the magistrate found that Remsburg was "seated next to or *behind*" the officer.⁴

The *Rensburg* court, quoting language from other cases from other states, cited the purpose behind the regulation and it is clearly intended to make sure that the suspect does not, *inter alia*, burp, regurgitate or put anything in her mouth. Thus, in order to comply with the regulation, the officer is required to be close enough to hear those type of events and also at least see if any of those events happened. Just being in the same room or, for that matter, the same vehicle, and present with the suspect does not comply with the regulation as we see happened in *State v. Carson*, 133 Idaho 451, 988 P.2d 225 (Ct. App. 1999).

In *Carson*, the defendant was arrested by an Idaho State Police officer for driving while under the influence of alcohol and, in that case, as with the present case, the officer was using an Intoxilyzer 5000. The ISP officer testified that he observed the defendant for 15 minutes before attempting to administer the test that was located at the Payette County Sheriff's Department. However, that machine would not calibrate and so the ISP officer transported the defendant to Washington County, about 13 miles away, to use an Intoxilyzer 5000 at that location. Upon arrival at the Washington County Sheriff's Office, the ISP officer immediately administered the breath test without performing another 15-minute observation of Carson "*and without asking Carson if he had belched or vomited during the drive.*" *Id.* 133 Idaho at 452.

Carson filed a motion *in limine* to exclude the evidence of the breath test and argued that

³See also, *State v. Charan*, 132 Idaho 341, 971 P.2d 1165 (Ct. App. 1999) where the court made a point in the recitation of the facts that the operator of the Intox machine kept the suspect in his "peripheral" view while he got up to about nine or ten feet away doing paperwork.

⁴See, Footnote 1 in *Rensburg*, 126 Idaho at 339 where the court noted: "There is nothing in the record to support the magistrate's finding that Remsburg may have been seated behind Campbell. Instead, the record clearly indicates that Remsburg was seated *next* to Campbell." (Emphasis added.)

there was not an adequate foundation for admission of the test results since the officer had not properly observed or monitored Carson the requisite 15 minutes prior to the administration of the test "to assure that Carson had not belched, regurgitated or placed anything in his mouth which could cause an inaccurate test." *Id.* 133 at 452. At the evidentiary hearing, the ISP officer testified that, in his opinion, he had conducted the necessary observation while transporting Carson to the Washington County facility even though Carson was placed in the back seat, passenger side of the police cruiser and turned on a light over the rear door so that Carson was illuminated. Carson's hands were also handcuffed behind his back and, supposedly, the ISP officer "intermittently observed Carson in the rear view mirror and listened for any indication of belching or regurgitation." *Id.* The ISP trooper acknowledged that during the drive from Payette County to Washington County rain was falling and the vehicle's windshield wipers were operating and he acknowledged that he wore a hearing aid in his left ear. In its holding, the *Carson* court noted:

It is apparent from the manual that the observation period is required in order to rule out the possibility that alcohol or other substances have been introduced into the subject's mouth from the outside or by belching or regurgitation. It is a precaution that is necessary to insure the validity of the test results. Although the observation requirement does not mandate that an officer "stare fixedly" at a test subject for the full fifteen-minute period, *Remsburg*, 126 Idaho at 340, 882 P.2d at 995, the level of surveillance must be such as could reasonably be expected to accomplish the purpose of the requirement.

In this case, during the trip to the Washington County Sheriff's office, Officer Miller's attention necessarily was devoted primarily to driving. He visually observed Carson only intermittently through glances at the rear-view mirror. Evidence presented at the motion hearing and common experience tell us that the officer's ability to use his hearing as a substitute for visual observation was impeded by noise from the automobile engine, tires on the road surface, rain and windshield wipers. There is also evidence that the officer's powers of aural observation were compromised by a hearing impairment. In our view, the State's foundational evidence did not demonstrate a mode of observation that would be likely to detect belching, regurgitation into the mouth, or the like. The circumstances of this case are not comparable to those presented in *Remsburg*, *supra*, where we held that an officer need not maintain constant visual contact with the subject for fifteen minutes. Although in that case the officer's attention was occasionally diverted from

the subject while he read an advisory form to her and programmed the test equipment, there was no evidence that other factors impeded the officer's ability to hear or smell. In the instant case, by contrast, the evidence shows that numerous sources of noise, the officer's hearing impairment, and his *position facing away from Carson*, would substantially impair his ability to supplement his visual observation with his other senses to insure that nothing occurred that would affect the validity of the test. Because the foundational requirements for admission of the breath test were not established in this case, the evidence should have been excluded. (Emphasis added.)

133 Idaho at 453.

Against this backdrop, we turn to the present issue raised by Ms. Wilkinson. At the hearing on December 1, 2009 counsel for Wilkinson pointed out some of the deficiencies made apparent by the documents generated by the arresting officer. On Exhibit 2 (the Intox print card) Officer Davis indicates that the "time first observed" was at 2:26 and the first breath test is noted at 2:39 which would be two minutes before the expiration of the 15-minute observation period. In his Probable Cause Affidavit, Exhibit 3, Officer Davis states, in relevant part, that he transported Ms. Wilkinson to the Blaine County Jail and,

upon arrival I checked Rebecca's mouth for any foreign substances and began my waiting period at 0226 hours, according to my personal wristwatch. I played the ALS audio tape for Rebecca. After the ALS tape finished I asked Rebecca if she had any questions and she stated it was a lot of information to hear. I handed Rebecca the ALS form for her to read. I asked Rebecca if she wished to continue and she stated she would give a breath sample. At 0243 hours, according to my personal wristwatch, Rebecca's BAC revealed .165 and .151. . . .

A couple of things stand out from the above quoted language: Officer Davis does not correlate his "personal wristwatch" to the clock on the Intox machine; he does not state that Rebecca submitted to the breath test after complying with the 15-minute observation period; he does not indicate that he closely observed or monitored Rebecca during the 15-minute observation period nor does he indicate that she did not burp or belch, regurgitate or put anything in or take anything out of her mouth; he does not clearly delineate when the first breath test was obtained nor does he recognize the time difference between the first and second breath sample which, according to Exhibit 2, the two samples are separated by a minute on the Intoxilyzer

5000EN clock. All he says is that at 0243 her breath test results revealed two numbers in excess of the legal limit. He could have said that he looked at his watch at 0253 hours and it would have provided the same information: The point is, when he looked at his wristwatch and states what the results were, it does not provide sufficient evidence that when he looked at his wristwatch, it complied with the 15-minute observation period.

A review of the CD is enlightening as to whether the officer complied with the 15-minute observation period and whether he monitored and observed Ms. Wilkinson. At 2:28:38⁵ Ms. Wilkinson enters the Intox room with Officer Davis and he immediately starts playing the advisory CD (this is the CD that plays the information contained on Exhibit 1). According to his Probable Cause Affidavit, Officer Davis started the 15-minute observation period *before* he started the advisory CD. Also, contrary to what Officer Davis states in his sworn affidavit, he does not check her mouth before starting the advisory CD (he does not check Ms. Wilkinson's mouth until approximately one minute after starting the CD) and, more importantly, he fails to advise her not to burp or belch or put anything in her mouth prior to submitting to the test.

At approximately 2:29:50 - over a minute after starting the advisory CD - Officer Davis decides to stop the CD and checks Ms. Wilkinson's mouth and asks her if she has anything in her mouth. He then starts the advisory CD where it was left off.

However, compliance with the 15-minute observation period was clearly violated at 2:30:05 when a female jailer enters the Intox room and placed Ms. Wilkinson facing the padded wall in the corner near the end of the measuring tape as depicted in Defendant's Exhibit 4. Ms. Wilkinson is asked to remove various personal items such as her shoes and jewelry and the female jailer pats her down while the advisory CD is playing. At this point, Ms. Wilkinson is facing away from Officer Davis and Officer Davis is facing away from Ms. Wilkinson.

At 2:30:35 Officer Davis stops the advisory CD while Ms. Wilkinson is being patted down with her face completely turned away from Officer Davis while the CD is playing, Officer Davis is in the opposite corner tending to his paperwork and getting the Intox machine ready. Numerous times during these events, Officer Davis has his face turned completely away from

⁵These time stamp references are shown on the video, on the lower left hand of the screen, on the CD and will be used by counsel hereafter when making references to times on the CD.

Ms. Wilkinson. As shown in Defendant's Exhibit 5, that distance is 18 feet and Defendant's Exhibit 3 shows the approximate location where Officer Davis was tending to his paperwork.

At approximately 2:30:50 the female jailer removes the handcuffs from Ms. Wilkinson and after the female jailer leaves the Intox room, Ms. Wilkinson takes a seat at the bench and Officer Davis restarts the advisory CD at approximately 2:32:44. It is the Petitioner's belief that this time - 2:32:44 - is the earliest that the 15 minute observation period could have commenced. Certainly, it could not be argued that the 15-minute observation period was satisfied while Ms. Wilkinson was being patted down by the female jailer.

1. For 21 seconds, starting at 2:32:47, Officer Davis clearly has his head turned completely away from Ms. Wilkinson who is approximately 16 feet away. (See, views from Camera 14 and 16)

2. At 2:33:06 the slider door to the booking room slams shut.

3. For 16 seconds at 2:33:17, Officer Davis has his head turned away from Ms. Wilkinson

4. At 2:33:35, for 30 seconds, Officer Davis is turned away from Ms. Wilkinson; further, during this time, at 2:33:45, Ms. Wilkinson has both hands by her mouth.

5. At 2:35:45 Officer Davis has his head completely turned away from Ms. Wilkinson for a couple of seconds and Ms. Wilkinson has her right hand next to her mouth and for the next two seconds it appears that her right hand is moving around her lips. At 2:35:50 it appears that Ms. Wilkinson flicks something from her hand towards the floor.

6. At 2:36:37, 2:36:55, and 2:37:13 Officer Davis has his head completely turned away from Ms. Wilkinson for up to 15 seconds. Again, at 2:36:56 it appears that Ms. Wilkinson's right hand is next to her mouth.

7. At 2:38:06 it appears that Officer Davis is making a call on his radio - again with his head turned completely away from Ms. Wilkinson for approximately 25 seconds.

All totalled, Officer Davis is turned away from Ms. Wilkinson for approximately one minute and 49 seconds.

At approximately 2:38:55 the advisory CD is completed and Officer Davis asks Ms. Wilkinson if she has any questions and she responds by saying that that is a lot of information.

Officer Davis then gives her the Notice of Suspension Advisory Form and at approximately 2:40:00 Ms. Wilkinson says that she wants to make a call. For the next four to five minutes there are numerous discussions between Ms. Wilkinson and Officer Davis about her desire to make a phone call and that she wants to discuss her situation with a lawyer. At one point, Ms. Wilkinson says that she is willing to pay the \$250 civil penalty and refuse the test. At 2:43:50 Ms. Wilkinson says that she wants to make a call "and find out what my rights are."

At 2:45:19 Ms. Wilkinson submits to the first breath test which is less than 15 minutes - by about 2 ½ minutes - after Officer Davis restarted the advisory CD at 2:32:44. Ms. Wilkinson's second sample is given at 2:46:05 which is also less than 15 minutes after the restart of the advisory CD by about a minute.

Once again at 2:54:08 Ms. Wilkinson asks Officer Davis if she can make a call. At 2:55:30 Ms. Wilkinson departs the Intox room and enters into the booking area at the Blaine County Sheriff's Department. At 2:55:44 the CD stops.

The Petitioner submits that based upon the video CD, Officer Davis did not comply with the 15-minute observation period in that he did not wait 15 minutes before the first breath test, or the second breath test, and he failed to observe and monitor her as required by the Manual and the SOP. The ALS suspension should be vacated.

There is also another basis to vacate the suspension. Despite repeated requests to make a telephone call and discuss her situation with a lawyer, Officer Davis never accommodates those requests. As provided in Idaho Code § 18-8002A(6) it provides in relevant part that the breath test results should be suppressed from evidence if the suspect was denied additional testing by the peace officer. *State of Idaho v. Carr*, 128 Idaho 181, 911 P.2d 774 (Ct. App. 1995) expanded the protections afforded by the statutory provision in that if the driver requests to make a phone call, which is denied by the peace officer, then the breath test results are suppressed. The issue in *Carr* was whether her constitutional rights were violated when the State denied her request to telephone her attorney following the administration of the State's BAC test.

As a result, when a person is arrested for DUI and given an evidentiary BAC test, that person must be allowed, at a minimum, to make a phone call upon request to do so. Such contact provides the means through which the arrestee is able to gather evidence tending to refute the State's evidence of intoxication and thereby preserve the "right to a fair opportunity to defend

against the State's accusations."

128 Idaho at 184.

According to the bail bond deposit which was offered by Ms. Wilkinson as an exhibit issued by the Blaine County Sheriff's Department, it was not until 4:03 a.m. that Ms. Wilkinson was able to post a cash bail and be released from custody. For this reason as well, Ms. Wilkinson's breath test results should be suppressed from evidence and not considered by you.

III. CONCLUSION

Based upon the foregoing and the evidence in the record, it is submitted that Officer Davis did not comply with the manual or the SOP and that he failed to wait 15 minutes before Ms. Wilkinson's breath test nor did Officer Davis observe and monitor her in a satisfactory fashion before she submitted to the test. Lastly, by failing to accommodate Ms. Wilkinson's repeated requests to make a telephone call and discuss her situation with a lawyer, her breath test results should be excluded under the statute, not considered by you, and is an alternative theory upon which the ALS suspension should be vacated.

DATED this 8 day of December, 2009.


BRIAN E. ELKINS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8 day of December, 2009 I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

Driver Services/ALS Hearing Section
Idaho Transportation Department
P. O. Box 7129
Boise, Id. 83707-1129

☒ Mailed
☐ Hand-Delivered
☐ Faxed to Fax Number 208.332.7810
☐ Faxed and mailed


BRIAN E. ELKINS

crim\wilkinson-ALS-writtn-argument.arg

BRIAN E. ELKINS
ATTORNEY AT LAW
A PROFESSIONAL CORPORATION

BITTERROOT SQUARE PROFESSIONAL BUILDING
208 SPRUCE AVENUE NORTH
P.O. BOX 766
KETCHUM, IDAHO 83340



TELEPHONE (208) 726-4338
FACSIMILE (208) 726-9328
E-MAIL: beelkins@cox.net

December 10, 2009

Eric G. Moody, Hearing Officer
Idaho Transportation Department
ALS Hearing Section
P. O. Box 7129
Boise, ID 83707-1129

Re: *In the Matter of the Driving Privileges of Rebecca S. Wilkinson*
License/Identification No. FA127022G
Your File No. 332000025887

Dear Eric:

As we discussed on the telephone on December 10, 2009 I took the original CD that I received from Lt. Jay Davis at the Blaine County Sheriff's Department and upon inspection saw that it was a CD-R, not a DVD-R. We attempted to copy the original to a DVD-R but the copying program would not permit it and we were prompted to use the same type of CD as the original.

In order to have the record complete in this matter, the recording from the Blaine County Intox room must be reviewed to support the factual basis of my argument that Ms. Wilkinson's ALS suspension be vacated. Because of the importance of this matter and the importance of my client's ability to drive and the cost that she has incurred thus far to provide a record for her issues that she has raised, I am willing to, if necessary, bring my laptop to your office so that you can view it.

In subsequent conversations with you on the telephone today, we decided that I would send you the original that I received from the Blaine County Sheriff's Department which, again, is on a CD-R and I enclose that CD for your review.

Please advise if I can be of further assistance.

Very truly yours,



Brian E. Elkins

BEE:cc

Enclosure

pc: Rebecca Wilkinson

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137



BRIAN E. ELKINS, P.C.
 Attorney at Law
 208 Spruce Avenue North
 P. O. Box 766
 Ketchum, ID 83340
 Telephone: (208) 726-4338
 Facsimile: (208) 726-9328
 E-mail: beelkins@cox.net
 Idaho State Bar No. 3150

Attorney for Petitioner

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE
 STATE OF IDAHO IN AND FOR THE IDAHO TRANSPORTATION DEPARTMENT

IN THE MATTER OF THE)
 SUSPENSION OF THE DRIVER'S)
 LICENSE OF)

REBECCA S. WILKINSON,)

Petitioner.)

REQUEST FOR RECONSIDERATION

The Petitioner, Rebecca Susan Wilkinson, by and through her attorney of record, Brian E. Elkins, moves the hearing officer pursuant to IDAPA 39.02.72.600 for a reconsideration of the Findings of Fact and Conclusions of Law and Order issued on December 18, 2009. Petitioner requests an opportunity to submit new evidence and requests that the hearing officer consider additional evidence. This request is based on the following:

- (1) That the ALS hearing officer abused his discretion in finding that Officer Davis satisfied the 15-minute observation period.
- (2) With respect to paragraph 14, page 8 of the Findings of Fact and Conclusions of Law and Order, the hearing officer abused his discretion in finding that Officer

REQUEST FOR RECONSIDERATION

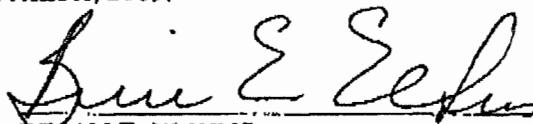
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Davis should have been called to testify to "clarify, explain, answer questions, and provide input on how he complied with ISP Forensic Services SOPs in monitoring Wilkinson prior to her evidentiary breath test." In paragraphs 13 through 17 on pages 7 and 8 of the hearing officer's Findings of Fact and Conclusions of Law and Order, as the DVD of the proceedings conducted in the Blaine County Intox room show that Officer Davis did not properly observe the Petitioner for 15 minutes prior to the breath tests.

- (3) Also, in paragraph 17, page 8 of the Findings of Fact and Conclusions of Law and Order, the ALS hearing officer points to the lack of "local case law" to show that the method used for observing drivers at the Blaine County Jail violates the 15-minute observation period. The Petitioner will be having an evidentiary hearing in the companion criminal case on January 7, 2010 and once the results of that hearing are decided by Blaine County Magistrate R. Ted Israel, the Petitioner requests an opportunity to submit that information to the ALS hearing officer assigned to this case.
- (4) Also, the Petitioner requests an opportunity to have Officer Davis "clarify, explain, answer questions and provide input on how he complied with the ISP Forensic Services SOPs."

DATED this 31 day of December, 2009.


BRIAN E. ELKINS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31 day of December, 2009 I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

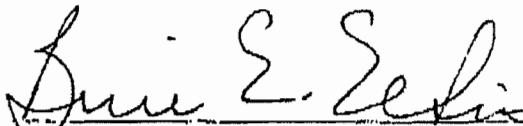
Driver Services/ALS Hearing Section
Idaho Transportation Department
P. O. Box 7129
Boise, Id. 83707-1129

_____ Mailed

_____ Hand-Delivered

☒ Faxed to Fax Number 208.332.7810

_____ Faxed and mailed


BRIAN E. ELKINS

crim/wilkinson-ALS-reconsid.req



BRIAN E. ELKINS, P.C.
Attorney at Law
208 Spruce Avenue North
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Telephone: (208) 726-4338
Facsimile: (208) 726-9328
E-mail: beelkins@cox.net
Idaho State Bar No. 3150

Attorney for Petitioner

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE
STATE OF IDAHO IN AND FOR THE IDAHO TRANSPORTATION DEPARTMENT

IN THE MATTER OF THE
SUSPENSION OF THE DRIVER'S
LICENSE OF
REBECCA S. WILKINSON,

Petitioner,

License/Identification No. FA127022G
File Number: 332000025887

**SUPPLEMENT TO PETITIONER'S
REQUEST FOR RECONSIDERATION**

The Petitioner, Rebecca Susan Wilkinson, by and through her attorney of record, Brian E. Elkins, supplements her Request for Reconsideration dated December 31, 2009, as follows:

- (1) On January 7, 2010 an evidentiary hearing was scheduled in the companion criminal case entitled *State of Idaho v. Rebecca S. Wilkinson*, Blaine County Case No. CR-09-2929. The evidentiary hearing in the case was with respect to the Defendant's motion to suppress from evidence the breath test results for failure of the arresting officer, Garth Davis of the Hailey Police Department, to comply with the 15-minute observation period.

The prosecutor handling the matter, Frederick C. Allington, City of Hailey

Misdemeanor Prosecuting Attorney, reviewed the DVD of the proceedings that transpired in the "Intox room" at the Blaine County Sheriff's Department. The original DVD was offered as an exhibit in this ALS proceeding and Hearing Officer Eric Moody makes reference to it in the Findings of Fact and Conclusions of Law and Order starting on page 6.

- (2) After reviewing the DVD along with Garth Davis, the prosecutor conceded that Garth Davis had not properly observed and monitored Rebecca Wilkinson prior to the time that she submitted to the breath test. Attached as Exhibit A is a Stipulation to Suppress BrAC Results and State's Motion to Dismiss, and as Exhibit B is Blaine County Magistrate R. Ted Israel's Order of Dismissal that was filed on January 7, 2010.
- (3) Officer Davis did not testify at the evidentiary hearing as the prosecutor quickly concluded after watching the DVD that Officer Davis did not comply with ISP Forensic Services SOPs contrary to the hearing officer's findings in paragraph 21, p. 8 of the Findings of Fact and Conclusions of Law and Order.
- (4) In paragraph 17 of the Findings of Fact and Conclusions of Law and Order, p. 8, Hearing Officer Eric Moody stated: "Furthermore, no local case law has been provided in showing the methods used to observe drivers at Blaine County Jail or Officer Davis violates the 15-minute observation period."
- (5) Based upon the Stipulation to Suppress BrAC Results and States Motion to Dismiss, along with Magistrate Judge Israel's Order of Dismissal, local case law has now been provided to the hearing officer to reconsider his decision.
- (6) The hearing officer seemed to place significance on the fact that a jailer spent some time with the Petitioner shortly before the CD of the Notice of Suspension Advisory was played for the Petitioner. See, Findings 8 and 9 on page 7 of the Findings of Fact and Conclusion of Law and Order. City Prosecutor Frederick C. Allington agreed that notwithstanding the jailer's pat-down of the Petitioner, the earliest that the 15-minute observation period could have started was at 2:32:44 when Officer Davis restarted the ALS CD after the female jailer completed her

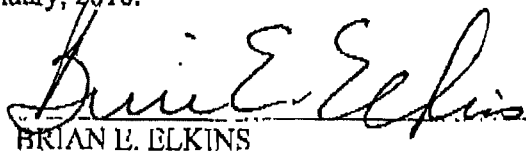
pat-down of the Petitioner. Accordingly, the contact with the female jailer was irrelevant for purposes of analyzing the 15-minute observation period. The fact that Officer Davis had his head completely turned away from the Petitioner, for significant periods of time, during the 15-minute observation period is what was significant to the prosecutor.

Fifteen minutes added to 2:32:44 would have concluded after the Petitioner's first breath test which occurred at 2:45:19. The second sample provided by the Petitioner was at 2:46:05.

- (7) With respect to the hearing officer's finding on page 8 of the Findings of Fact and Conclusions of Law and Order, Darren Jewkes, the program manager for breath alcohol testing, recently testified in another case in Blaine County that the 15-minute observation period must be satisfied notwithstanding a lack of mouth alcohol detected ("Invalid Sample") on Exhibit 2 as noted by Eric Moody, ALS Hearing Officer. Mr. Jewkes testified that he did not agree with the B'S's testimony in *State v. Charan*, 132 Idaho 341, where Officer Bones said the "negative slope indicator" would rule out any residual mouth alcohol if the suspect burped or belched during the 15-minute observation period. Thus, in Officer Bones' view the 15-minute observation period did not need to be started anew. Mr. Jewkes did not agree with that.

Based upon the foregoing, the Petitioner respectfully requests that the hearing officer reconsider his order and vacate the suspension previously commenced on December 28, 2009.

DATED this 8 day of January, 2010.


BRIAN E. ELKINS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8 day of January, 2010 I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

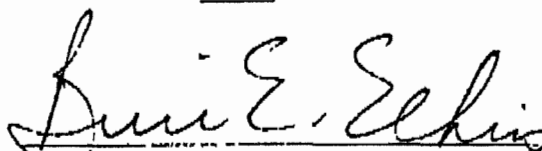
Driver Services/ALS Hearing Section
Idaho Transportation Department
P. O. Box 7129
Boise, Id. 83707-1129

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☒ Faxed to Fax Number 208.332.7810

☐ Faxed and mailed


BRIAN E. ELKINS

crim\wilkinson-ALS-recon-supp.req

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E-mail: beelkins@cox.net
Idaho State Bar No. 3150



Attorney for Defendant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THE STATE OF IDAHO,)	
)	
Plaintiff,	)	Case No. CR 09-2929
)	
v.	)	STIPULATION TO SUPPRESS BrAC
	)	RESULTS AND STATE'S MOTION TO
REBECCA S. WILKINSON,	)	DISMISS
)	
Defendant.)	
)	
DI. # FA1270226)	
DOB: 11-14-1965)	
_____)	

The Plaintiff, State of Idaho, by and through Frederick C. Allington, City of Hailey
Misdemeanor Prosecuting Attorney stipulates and agrees with the Defendant, Rebecca S.
Wilkinson, by and through her attorney of record, Brian E. Elkins, that the breath test results
obtained from the Defendant on October 11, 2009, through an Intoxilyzer 5000EN machine, SN
68-013466, shall be suppressed from evidence for failure of operator, Garth Davis, to observe
and monitor the Defendant the requisite 15 minutes before she submitted to the breath test. Said
requisite 15 minute observation period is required in the Standard Operating Procedures and

STIPULATION TO SUPPRESS BrAC RESULTS AND STATE'S MOTION TO DISMISS - 1

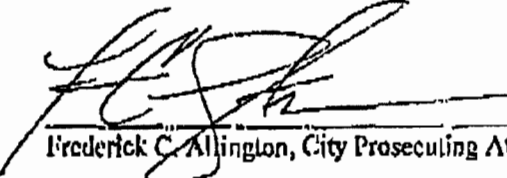
EXHIBIT A

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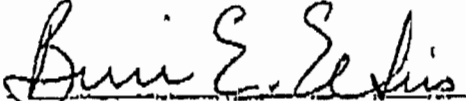
Operators Manual for the Intoxilyzer 5000 and has also been mandated by Idaho case law.

Whereupon the State moved to dismiss the case, and there being no objection from the Defendant, the motion to dismiss was granted by the Court.

DATED this 7 day of January, 2010.


Frederick C. Allington, City Prosecuting Attorney

DATED this 7th day of January, 2010.

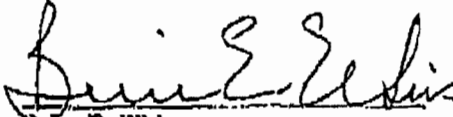

Brian E. Elkins
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7 day of JANUARY, 2010, I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

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☒ Faxed to 788-7901
☐ Faxed and mailed

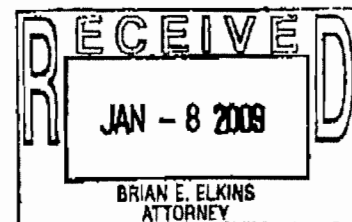
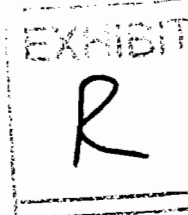
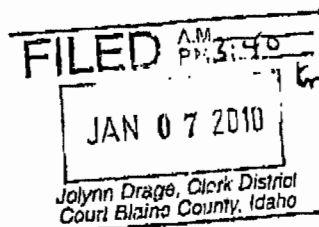
Frederick C. Allington
Attorney at Law
115 2nd Avenue S.
Hailey, ID 83333


Brian E. Elkins

STIPULATION TO SUPPRESS BRAC RESULTS AND STATE'S MOTION TO DISMISS - 2

BRIAN E. ELKINS, P.C.
Attorney at Law
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P. O. Box 766
Ketchum, ID 83340
Telephone: (208) 726-4338
Facsimile: (208) 726-9328
E-mail: beelkins@cox.net
Idaho State Bar No. 3150

Attorney for Defendant



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THE STATE OF IDAHO,

Plaintiff,

v.

REBECCA S. WILKINSON,

Defendant.

Case No. CR 09-2929

ORDER OF DISMISSAL

Based upon the Stipulation to Suppress BrAC Results and the State's Motion to Dismiss,
and good cause appearing therefor;

IT IS HEREBY ORDERED that the Defendant's breath test results for alcohol
concentration be suppressed from evidence for failure of the arresting officer/operator of the
Intoxilyzer 5000 breath testing machine, to properly observe and monitor the Defendant for 15
minutes prior to the time that she submitted to the breath test.

Whereupon the State moved to dismiss the Citation, number 25887, which charged the

ORDER OF DISMISSAL - 1

EXHIBIT B

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Defendant with Driving While Under the Influence of Alcohol, in violation of Idaho Code
Section 18-8004 filed in this matter; and there being no objection from the Defendant, this case
shall be DISMISSED, with prejudice.

Any bond/bail posted in this matter shall be exonerated.

DATED this 7 day of January, 2010.


R. Ted Israel, Magistrate Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of January, 2010, I caused a true and
correct copy of the foregoing document to be delivered to the following in the method marked
herein:

..... Mailed
☒ Hand-Delivered
..... Faxed to 788-7901
..... Faxed and mailed

Frederick C. Allington
City Misdemeanor Prosecuting Attorney
115 Second Ave. South
Hailey, ID 83333

☒ Mailed
..... Hand-Delivered
..... Faxed to 726-9328
..... Faxed and mailed

Brian E. Elkins
P. O. Box 766
Ketchum, ID 83340


Clerk of the Court

EXHIBIT

S

SUBPOENA – CIVIL

IDAHO TRANSPORTATION DEPT.
3311 W. STATE ST.
BOISE, ID 83703

TELEPHONE # (208)334-8720
PO BOX 7129
BOISE, ID 83707

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE STATE
OF IDAHO IN AND FOR THE IDAHO TRANSPORTATION
DEPARTMENT

ADMINISTRATIVE HEARING

IN THE MATTER OF THE
DRIVING PRIVILEGES OF
WILKINSON, REBECCA SUSAN

SUBPOENA

THE STATE OF IDAHO TO: OFFICER GARTH DAVIS - HAILEY POLICE DEPARTMENT

You are hereby commanded to appear before Hearing Officer Eric G. Moody of the Idaho Transportation Department, as a witness in the above-entitled action, by means of a telephone conference call.

YOU WILL NEED TO PROVIDE YOUR TELEPHONE NUMBER TO THE IDAHO DEPARTMENT OF TRANSPORTATION AT (208) 334-8720, PRIOR TO THE DAY OF THE SCHEDULED HEARING.

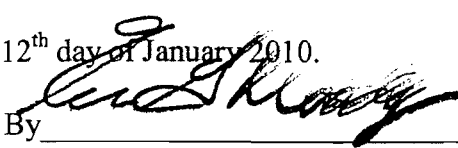
The hearing is scheduled on the 26th day of January 2010, at Three o'clock (3:00pm) Mountain Time.

****IF YOU ARE UNABLE TO COMPLY WITH THIS SUBPOENA, PLEASE IMMEDIATELY CONTACT MIKE AT (208) 334-8720.****

Further, prior to reporting, for your convenience you may confirm the status of your subpoena by calling the Idaho Transportation Department at (208)334-8720 before the hearing date listed above.

Witness my hand this 12th day of January 2010.

By


Eric G. Moody
Hearing Officer

149 095



BRIAN E. ELKINS, P.C.
 Attorney at Law
 208 Spruce Avenue North
 P. O. Box 766
 Ketchum, ID 83340
 Telephone: (208) 726-4338
 Facsimile: (208) 726-9328
 E-mail: beelkins@cox.net
 Idaho State Bar No. 3150

Attorney for Petitioner

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE
 STATE OF IDAHO IN AND FOR THE IDAHO TRANSPORTATION DEPARTMENT

IN THE MATTER OF THE
 SUSPENSION OF THE DRIVER'S
 LICENSE OF
 REBECCA S. WILKINSON,

)
)
) License/Identification No. FA127022G
) File Number: 332000025887
)

) MOTION FOR STAY OF
) SUSPENSION OF DRIVING PRIVILEGES
)
)
)
)
)
)
)

Petitioner.

COMES NOW, the above named Petitioner, Rebecca Susan Wilkinson, by and through her attorney of record, Brian E. Elkins, and moves AJS Hearing Officer Eric Moody for the entry of an order staying the suspension of the Petitioner's driving privileges while the Motion for Reconsideration is pending. This motion is based upon the following:

- (1) The Petitioner was arrested for driving while under the influence of alcohol in violation of Idaho Code § 18-8004 on October 11, 2009. The Petitioner was subsequently requested to submit to a blood alcohol concentration test through a breath testing machine, which she allegedly failed, and was served a Notice of Suspension Advisory Form.

- (2) The Petitioner timely requested an ALS hearing and on November 5, 2009 the Idaho Transportation Department issued a notice of "Pending Action" whereby the ALS suspension was "temporarily stopped: pending administrative hearing and hearing officer's decision."
- (3) On December 17, 2009 ALS hearing officer Eric Moody issued his Findings of Fact and Conclusions of Law sustaining the ALS suspension and quashed the previously entered stay order and reinstated the ALS suspension for 90 days commencing on December 28, 2009.
- (4) On December 31, 2009 the Petitioner filed her Request for Reconsideration pursuant to IDAPA 39.02.72.600.
- (5) On January 12, 2010 ITD sent out a Notice of Telephone Hearing setting this matter for hearing on the Motion for Reconsideration for January 26, 2010.
- (6) As of January 12, 2010 the Petitioner has been serving her ALS suspension for 15 days of the 30-day absolute suspension. In the event a stay is not entered, the Petitioner will suffer, at a minimum, an additional 14 days, putting the total of 29 days absolute suspension as of the day set for the hearing on the Petitioner's Motion to Reconsider.
- (7) The Petitioner is suffering great inconvenience, almost amounting to irreparable harm, by not being able to drive during this period of suspension when there is a meritorious claim that her ALS suspension should be vacated. The Petitioner has two children that are in grade school and normally she drives her kids to school in Ketchum from her home which is approximately five miles. Both kids are involved in extensive before-school and after-school activities and while she has served the 15 days of absolute suspension it has caused great hardship in trying to transport her kids to and from school and activities.
- (8) The Petitioner is separated from her husband and is the primary custodian for the children. The Petitioner has been required to hire the services of a driver to drive her kids back and forth to the various activities, all at the expense of \$500 per week.

- (9) The Petitioner will incur at least another \$1,000 to hire the services of a driver while this matter is pending before the hearing on the Petitioner's Motion to Reconsider.
- (10) In light of the fact that the hearing officer has now been supplied with a Stipulation and Order from the companion criminal case whereby the prosecutor stipulated that the arresting officer, Garth Davis, did not comply with the 15-minute observation period prior to the time that the Petitioner submitted to the breath test, and Magistrate Judge R. Ted Israel dismissed the case, finding that the officer failed to "properly observe and monitor the defendant for 15 minutes prior to the time that she submitted to the breath test," a stay should be entered by this hearing officer pending the outcome of the Motion to Reconsider.

DATED this 12 day of January, 2010.

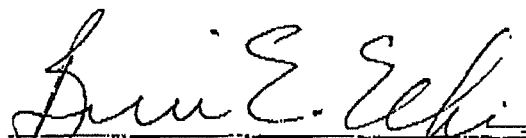

BRIAN E. ELKINS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12 day of January, 2010 I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

Driver Services/ALS Hearing Section
Idaho Transportation Department
P. O. Box 7129
Boise, Id. 83707-1129

☐ Mailed
☐ Hand-Delivered
☒ Faxed to Fax Number 208.332.7810
☐ Faxed and mailed


BRIAN E. ELKINS

crim\wilkinson\ALS\stay-suspension.mot



IDAHO TRANSPORTATION DEPARTMENT

Driver Services • P.O. Box 7129
Boise ID 83707-1129

(208) 334-8735
dmv.idaho.gov

PHONE: (208) 334-8736

WILKINSON, REBECCA SUSAN

OCTOBER 22, 2009

BOX 4976
KETCHUM

ID 83340

LIC/IDENT NO: [REDACTED]
FILE NUMBER: [REDACTED]
DATE OF BIRTH: [REDACTED]

NOTICE OF TELEPHONE HEARING

A HEARING WILL BE HELD PURSUANT TO YOUR REQUEST REGARDING THE ADMINISTRATIVE LICENSE SUSPENSION DATED OCTOBER 11, 2009 . THE HEARING WILL BE CONDUCTED BY TELEPHONE CONFERENCE CALL ON NOVEMBER 03, 2009 AT 9:00MT . THE TELEPHONE CALL WILL BE PLACED TO:
() YOU, AT TELEPHONE #:
(XXX) YOUR ATTORNEY: BRIAN ELKINS
AT TELEPHONE #: 208 726-4338

THE HEARING OFFICER PRESIDING AT THE HEARING WILL BE ERIC MOODY .

* YOU HAVE 7 DAYS FROM THE DATE OF THIS NOTICE TO REQUEST A *
* CONTINUANCE FOR GOOD CAUSE SHOWN. FAILURE TO REQUEST A *
* CONTINUANCE WITHIN 7 DAYS MAY RESULT IN THE DENIAL OF REQUEST. *

THE HEARING OFFICER WILL TAKE JUDICIAL NOTICE OF THE RECORDS REGULARLY MAINTAINED BY THE IDAHO TRANSPORTATION DEPARTMENT, THE IDAHO ADMINISTRATIVE PROCEDURE ACT RULES, ALL MANUALS ADOPTED UNDER IDAPA RULES 11.03.01 AND 39.02.72, IDAHO STATUTES, AND REPORTED IDAHO COURT DECISIONS.

THE HEARING WILL BE CONDUCTED ACCORDING TO THE PROVISIONS OF TITLE 67, CHAPTER 52, IDAHO CODE, AND THE RULES OF PRACTICE AND PROCEDURES OF THE IDAHO TRANSPORTATION DEPARTMENT. IF YOU NEED FURTHER ASSISTANCE, PLEASE CALL (208) 334-8720.

(COPI)

CC: BRIAN ELKINS

IMPORTANT!
INFORMATION ABOUT YOUR TELEPHONE HEARING

- THE IDAHO TRANSPORTATION DEPT., ADMINISTRATIVE HEARING UNIT'S PHONE NUMBER IS (208) 332-2004. THE FAX NUMBER IS (208) 332-2002. THE MAILING ADDRESS IS PO BOX 7129, BOISE ID 83707-1129.
- The Hearing is YOUR chance of presenting witnesses and giving evidence before the Department. The Hearing also provides you or your attorney an opportunity to appeal. To stop the suspension YOU must demonstrate to the Hearing Officer by a preponderance of the evidence that:
 1. The peace officer did not have legal cause to stop you.
 2. The peace officer did not have legal cause to believe you were driving or in actual physical control of a motor vehicle while under the influence of alcohol, drugs or other intoxicating substances in violation of the provision of Section 18-8004, 18-8004C, or 18-8006 Idaho Code.
 3. The evidentiary test did not show an alcohol concentration or presence of drugs or other intoxicating substances in violation of Section 18-8004, 18-8004C or 18-8006 Idaho Code.
 4. The test for alcohol, drugs or other intoxicating substances was not conducted in accordance with the requirements of Section 18-8004(4), Idaho Code, or the testing equipment was not functioning properly when the test was administered.
 5. You were not informed of the consequences of submitting to evidentiary testing.
- If you have not provided a telephone number at which you can be reached, or the number contained in the notice is wrong, or if you have a number that is more convenient for you, notify the Administrative Hearing Unit at (208) 332-2004. If you fail to provide a phone number for the given time and date contained in the Notice of Hearing, it will be concluded that you failed to attend the hearing and the matter may be decided in your absence. All hearings will be recorded.
- If you need assistance to participate in the hearing because of speech, hearing, language, or other special needs, immediately contact the Administrative Hearing Unit at (208) 332-2004. Necessary arrangements can be made to assist you.
- The Administrative Hearing must be held within twenty (20) days of the receipt of the Request for Hearing. However, upon showing good cause, the Hearing Officer may grant an extension of up to ten (10) additional days in which to hold the hearing. Any extensions shall not stay the suspension, or the duration of your temporary permit (if one was issued).
- Documents to be presented to the Hearing Officer at the hearing for his consideration are enclosed with this hearing notice. Any additional relevant documents received by the department after this initial notice will be mailed to you. You have a right to object to the inclusion of any documents into the hearing record. The Hearing Officer will make the final determination. You also have the right to submit other documents to the Hearing Officer for consideration. These documents must be provided prior to the hearing.
- An attorney or other adult representative may represent you at the hearing, but representation is not required. It is your responsibility to arrange for any type of representation.
- If you intend to call witnesses, it is your responsibility to have those witnesses available on the date and time of the hearing. The law does not require the arresting officer to be present at the hearing unless subpoenaed.
- If your witnesses are unwilling to participate voluntarily, or documents are not provided voluntarily, you may submit a request to the Hearing Officer that a subpoena be issued. Please mail or fax any requests for subpoenas to the information provided above. This should include the name of the witness and any documents or records in possession of the witness you wish to be produced. Upon issuance of the subpoena by the Hearing Officer, you will be responsible to serve the subpoena to the witness at least 72 hours prior to the hearing and provide a certificate of service to the Hearing Officer prior to the hearing date. You may be required to pay in advance, if demanded, witness fees and travel fees in accordance with Idaho Civil Procedures.
- Hearings are conducted in an informal but orderly manner. All testimony is taken under oath or affirmation. The Hearing Officer has the sole authority for the conduct of the hearing and will:
 1. Explain the issues and the meaning of terms that are not clearly understood.
 2. Explain the order in which you will testify, ask questions or offer rebuttal.
 3. Assist you in asking questions of other witnesses.
 4. Question you and witnesses to obtain relevant facts.
 5. Determine if testimony and documents being offered are relevant.
 6. Maintain control of the hearing so it will progress in an orderly manner that protects your rights.
 7. Issue a written decision following the hearing.
- Your rights in a hearing are:
 1. To have a representative.
 2. To testify.
 3. To present witnesses and documents.
 4. To question witnesses.
 5. To respond to the evidence presented.
 6. To make a brief statement of your position at the end of the hearing.
- You may petition for the disqualification of the assigned Hearing Officer and have a new one appointed if you have cause to believe that the assigned officer is bias, prejudiced or for some reason unable to give you a fair hearing on the matter. The petition must be sent to the Administrative Hearing Unit office. Your suspension shall not be stayed if such a petition results in the delay of the hearing.
- If you wish to cancel your hearing, your request must be mailed or faxed to the information provided above. Failure to do so will result in the hearing proceeding as scheduled and a default finding being made in your absence.
- If you need to request a continuance or reschedule the hearing. The request must be mailed or faxed to the information provided above prior to the hearing date. If the hearing cannot be held within 30 days from the date of service you will need to include a statement in your request that says you acknowledge that the hearing will not be held within the 30 day statutory time, and that you are aware that your suspension will remain in effect.

Transmission Report

Date/Time
Local ID 1
Local ID 2

10-23-2009
2083322064

07:13:26 a.m.

Transmit Header Text
Local Name 1
Local Name 2

This document : Confirmed
(reduced sample and details below)
Document size : 8.5"x11"

DRIVER SERVICES
ADMINISTRATIVE HEARING SECTION
PO BOX 7129
BOISE ID 83707
PHONE: 208 334-8720
FAX: 208 332-2002

ADMINISTRATIVE
HEARING SECTION

Fax

To: Brian Elkins

From: MIKE

Fax: 208 726-8328

Date: October 23, 2009

Phone:

Pages: 2

Re: SUBPOENA DUCES TECUM

CC:

REQUEST FOR CALIBRATION

RECORDS/INSTRUMENT

OPERATIONS LOGSHEETS FOR

WILKINSON, REBECCA SUSAN

A.L.S. HEARING

Comments:

*****IMPORTANT INFORMATION*****

Attached, please find the Subpoena Duces Tecum that has been issued, per your request, for the A.L.S. hearing on the above person. **YOUR OFFICE** will be responsible for serving the Subpoena. The Subpoena **MUST BE SERVED WITHIN 72 HOURS OF ISSUANCE**. Please fax a copy of the Certificate of Service prior to the scheduled time of the hearing to (208) 332-2002.

Thank You

Total Pages Scanned : 2

Total Pages Confirmed : 2

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	120	12087269328	07:12:28 a.m. 10-23-2009	00:00:26	2/2	1	EC	HS	CP24000

Abbreviations:

HS: Host send
HR: Host receive
WS: Waiting send

PL: Polled local
PR: Polled remote
MS: Mailbox save

MP: Mailbox print
CP: Completed
FA: Fail

TU: Terminated by user
TS: Terminated by system
RP: Report

G3: Group 3
EC: Error Correct

101

Transmission Report

Date/Time
Local ID 1
Local ID 2

10-23-2009
2083322064

07:17:48 a.m.

Transmit Header Text
Local Name 1
Local Name 2

This document : Confirmed
(reduced sample and details below)
Document size : 8.5"x11"

DRIVER SERVICES
ADMINISTRATIVE HEARING SECTION
PO BOX 7129
BOISE ID 83707
PHONE: 208 334-8720
FAX: 208 332-2002

ADMINISTRATIVE
HEARING SECTION

Fax

To: Brian Elkins From: Mike
Fax: 208 726-8328 Date: October 23, 2009
Phone: Pages: 2
Re: CIVIL SUBPOENA REQUEST CC:
FOR WILKINSON, REBECCA
SUSAN A.L.S. HEARING

Comments:

****IMPORTANT INFORMATION****

Attached, please find the Subpoena that has been issued, per your request, for the A.L.S. hearing on the above person. **YOUR OFFICE** will be responsible for serving the Subpoena. The Subpoena must be served **at least 72 hours prior to the hearing**. Please fax a copy of the Certificate of Service prior to the scheduled time of the hearing to (208) 332-2002.

Thank You

Total Pages Scanned : 2

Total Pages Confirmed : 2

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	126	12087269328	07:16:53 a.m. 10-23-2009	00:00:23	2/2	1	EC	HS	CP24000

Abbreviations:

HS: Host send
HR: Host receive
WS: Waiting send

PL: Polled local
PR: Polled remote
MS: Mailbox save

MP: Mailbox print
CP: Completed
FA: Fail

TU: Terminated by user
TS: Terminated by system
RP: Report

G3: Group 3
EC: Error Correct

156
102

Transmission Report

Date/Time
Local ID 1
Local ID 2

10-23-2009
2083322064

07:19:01 a.m.

Transmit Header Text
Local Name 1
Local Name 2

This document : Confirmed
(reduced sample and details below)
Document size : 8.5"x11"

DRIVER SERVICES
ADMINISTRATIVE HEARING SECTION
PO BOX 7129
BOISE ID 83707
PHONE: 208 334-8720
FAX: 208 332-2002

ADMINISTRATIVE
HEARING SECTION

Fax

To: Brian Elkins From: Mike
Fax: 208 726-9328 Date: October 23, 2009
Phone: Pages: 2
Re: CIVIL SUBPOENA REQUEST CC:
FOR WILKINSON, REBECCA
SUSAN A.L.S. HEARING

Comments

****IMPORTANT INFORMATION****

Attached, please find the Subpoena that has been issued, per your request, for the A.L.S. hearing on the above person. **YOUR OFFICE** will be responsible for serving the Subpoena. The Subpoena must be served **at least 72 hours prior to the hearing**. Please fax a copy of the Certificate of Service prior to the scheduled time of the hearing to (208) 332-2002.

Thank You

Total Pages Scanned : 2

Total Pages Confirmed : 2

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	128	12087269328	07:18:09 a.m. 10-23-2009	00:00:21	2/2	1	EC	HS	CP24000

Abbreviations:

HS: Host send
HR: Host receive
WS: Waiting send

PL: Polled local
PR: Polled remote
MS: Mailbox save

MP: Mailbox print
CP: Completed
FA: Fail

TU: Terminated by user
TS: Terminated by system
RP: Report

G3: Group 3
EC: Error Correct

157
103

Transmission Report

Date/Time
Local ID 1
Local ID 2

10-27-2009
2083322064

07:24:45 a.m.

Transmit Header Text
Local Name 1
Local Name 2

This document : Confirmed
(reduced sample and details below)
Document size : 8.5"x11"

DRIVER SERVICES
ADMINISTRATIVE HEARING SECTION
PO BOX 7129
BOISE ID 83707
PHONE: 208 334-8720
FAX: 208 332-2002

**ADMINISTRATIVE
HEARING SECTION**

Fax

To: Brian Elkins	From: MIKE
Fax: 208 726-9328	Date: October 27, 2009
Phone:	Pages: 2
Re: Subpoena - Duces Tecum	CC:
Instrument Operations Log For	
WILKINSON, REBECCA SUSAN	

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

*Comments:

Total Pages Scanned : 3

Total Pages Confirmed : 3

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	228	12087269328	07:23:28 a.m. 10-27-2009	00:00:44	3/3	1	EC	HS	CP24000

Abbreviations:

HS: Host send
HR: Host receive
WS: Waiting send

PL: Polled local
PR: Polled remote
MS: Mailbox save

MP: Mailbox print
CP: Completed
FA: Fail

TU: Terminated by user
TS: Terminated by system
RP: Report

G3: Group 3
EC: Error Correct

158
104

BRIAN E. ELKINS, P.C.
Attorney at Law
208 Spruce Avenue North
P. O. Box 766
Ketchum, ID 83340
Telephone: (208) 726-4338
Facsimile: (208) 726-9328
E-mail: beelkins@cox.net
Idaho State Bar No. 3150

Attorney for Petitioner

BEFORE THE IDAHO TRANSPORTATION BOARD OF THE
STATE OF IDAHO IN AND FOR THE IDAHO TRANSPORTATION DEPARTMENT

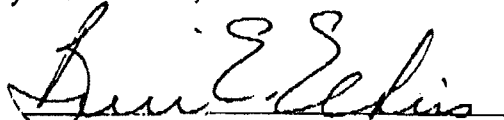
IN THE MATTER OF THE	)	License/Ident No.: FA127022G
SUSPENSION OF THE DRIVER'S)	
LICENSE OF	)	File No.: 332000025887
)	
REBECCA S. WILKINSON,	)	PETITIONER'S WAIVER OF 30 DAY
	)	TIME LIMIT TO CONDUCT ALS
Petitioner.	)	HEARING
)	
)	

Comes Now, the above named Petitioner Rebecca S. Wilkinson, by and through her attorney, Brian E. Elkins, and submits her waiver of right to conduct the Administrative License Suspension Hearing ("ALS") within 30 days of Petitioner's request for ALS hearing, as required by I.C. § 18-8002A(7). Petitioner's waiver herein is based upon the fact that the arresting officer, Garth Davis of the Hailey Police Department, who had been subpoenaed to attend the ALS hearing scheduled for November 3, 2009 at 9:00 a.m., was unable to attend due to a medical condition that required surgery on or about November 3, 2009.

This waiver is also conditioned upon the ALS Hearing Officer's agreement to enter an order staying the suspension of the Petitioner's driving privileges that was set to occur pursuant PETITIONER'S WAIVER OF 30 DAY TIME REQUIREMENT TO CONDUCT ALS HEARING, p. 1

to the ALS statute. ALS hearing section personnel indicated that the ALS Hearing Officer, Mr. Eric Moody, was going to grant a stay on the suspension of the Petitioner's driving privileges upon receipt of this waiver. Such stay is to remain in effect until the ALS hearing is conducted and further order is entered by the ALS Hearing Officer.

DATED this 5 day of November, 2009.


Brian E. Elkins, Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5 day of November, 2009, I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

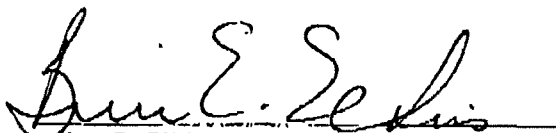
Driver Services/ALS Section
Idaho Transportation Department
P. O. Box 7129
Boise, Id. 83707-1129

_____ Mailed

_____ Hand-Delivered

☒ Faxed to Fax Number 208.332.7810

_____ Faxed and mailed


Brian E. Elkins

als\waiver30daytime

NOTE: Blocked calls are not displayed on this report.
For more information, see Junk Fax Report and the Caller ID Report.

Last Transaction

Date	Time	Type	Station ID Caller ID	Duration	Pages	Result
Nov 5	12:15PM	Received	12087269328	0:26	1	Error 232*

* A communication error occurred during the fax transmission.
If you're sending, try again and/or call to make sure the recipient's
fax machine is ready to receive faxes. If you're receiving, contact
the initiator and ask them to send the document again.



IDAHO TRANSPORTATION DEPARTMENT

Driver Services • P.O. Box 7129
Boise ID 83707-1129

10025
(208) 334-8735
dmv.idaho.gov

PHONE: (208) 334-8736

WILKINSON, REBECCA SUSAN

NOVEMBER 05, 2009

BOX 4976
KETCHUM

ID 83340

LIC/IDENT NO:
FILE NUMBER:
DATE OF BIRTH:

PENDING ACTION

THIS IS TO NOTIFY YOU THAT EFFECTIVE 12:01 A.M. NOVEMBER 05, 2009 ,
THE WITHDRAWAL PERIOD FOR:
ADMIN LIC SUSP BAC .08+/DRUGS/INTOX SUBS I.C. 18-8002A

IS TEMPORARILY STOPPED:
PENDING ADMINISTRATIVE HEARING AND HEARING OFFICERS DECISION

YOUR CLASS D DRIVING PRIVILEGES ARE CLEAR UNLESS OTHERWISE NOTIFIED.
THE ORIGINAL WITHDRAWAL DATES ARE NO LONGER VALID. IN THE EVENT THE
WITHDRAWAL IS RE-ENFORCED, CORRECTED DATES WILL BE ISSUED WITH CREDIT
GIVEN FOR ANY TIME SPENT UNDER WITHDRAWAL.

LICENSE ENCLOSED

COPY

Transmission Report

Date/Time
Local ID 1
Local ID 2

11-05-2009
2083322064

01:00:56 p.m.

Transmit Header Text
Local Name 1
Local Name 2

This document : Confirmed
(reduced sample and details below)
Document size : 8.5"x11"

DRIVER SERVICES
ADMINISTRATIVE HEARING SECTION
PO BOX 7129
BOISE ID 83707
PHONE: 208 334-8720
FAX: 208 332-2002

**ADMINISTRATIVE
HEARING SECTION**

Fax

To: Brian Elkins	From: MIKE
Fax: 208 726-9328	Date: November 5, 2009
Phone:	Pages: 3
Re: Stay Order For	CC:
WILKINSON, REBECCA SUSAN	

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

•Comments:

Total Pages Scanned : 3

Total Pages Confirmed : 3

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	490	12087269328	01:00:01 p.m. 11-05-2009	00:00:22	3/3	1	EC	HS	CP26400

Abbreviations:

HS: Host send
HR: Host receive
WS: Waiting send

PL: Polled local
PR: Polled remote
MS: Mailbox save

MP: Mailbox print
CP: Completed
FA: Fail

TU: Terminated by user
TS: Terminated by system
RP: Report

G3: Group 3
EC: Error Correct

109
163



IDAHO TRANSPORTATION DEPARTMENT

Driver Services • P.O. Box 7129
Boise ID 83707-1129

10025
(208) 334-8735
dmv.idaho.gov

PHONE: (208) 334-8736

WILKINSON, REBECCA SUSAN

NOVEMBER 10, 2009

BOX 4976
KETCHUM

ID 83340

LIC/IDENT NO: FA127022G
FILE NUMBER: 332000025887
DATE OF BIRTH: 11-14-1965

NOTICE OF RESCHEDULED TELEPHONE HEARING

THE DATE FOR THE HEARING REGARDING THE SUSPENSION OR DISQUALIFICATION OF YOUR DRIVING PRIVILEGES HAS BEEN RESCHEDULED.

PURSUANT TO 18-8002A(7) NO FURTHER CONTINUANCE WILL BE GRANTED.

*THIS RESCHEDULE SHALL NOT OPERATE AS A STAY OF THE SUSPENSION, *
*UNLESS OTHERWISE ORDERED BY THE HEARING OFFICER. ANY TEMPORARY *
*PERMIT ISSUED SHALL EXPIRE THIRTY (30) DAYS AFTER SERVICE OF THE *
*NOTICE OF SUSPENSION. *

THE HEARING OFFICER HAS SCHEDULED YOUR HEARING TO BE CONDUCTED BY TELEPHONE CONFERENCE CALL ON DECEMBER 01, 2009 AT 3:00MT . THE TELEPHONE CALL WILL BE PLACED TO:

- () YOU, AT TELEPHONE #:
(XXX) YOUR ATTORNEY: BRIAN ELKINS
AT TELEPHONE#: 208 726-4338
() IF THIS TELEPHONE NUMBER IS INCORRECT, IMMEDIATELY CONTACT THE ADMINISTRATIVE HEARING STAFF AT (208) 332-2005.

THE HEARING OFFICER PRESIDING AT THE HEARING WILL BE ERIC MOODY

THE HEARING WILL BE CONDUCTED ACCORDING TO THE PROVISIONS OF TITLE 67, CHAPTER 52, IDAHO CODE, AND THE RULES OF PRACTICE AND PROCEDURES OF THE IDAHO TRANSPORTATION DEPARTMENT. THIS HEARING PROVIDES YOU OR YOUR ATTORNEY AN OPPORTUNITY TO APPEAL ON YOUR BEHALF. IF YOU NEED FURTHER ASSISTANCE, PLEASE CALL (208) 332-2005.

COPY

Transmission Report

Date/Time
Local ID 1
Local ID 2

11-10-2009
2083322064

01:25:12 p.m.

Transmit Header Text
Local Name 1
Local Name 2

This document : Confirmed
(reduced sample and details below)
Document size : 8.5"x11"

**DRIVER SERVICES
ADMINISTRATIVE HEARING SECTION
PO BOX 7129
BOISE ID 83707
PHONE: 208 334-8720
FAX: 208 332-2002**

**ADMINISTRATIVE
HEARING SECTION**

Fax

To: Brian Elkins	From: MIKE
Fax: 208 726-9328	Date: November 10, 2009
Phone:	Pages: 2
Re: RESCHEDULED A.L.S. HEARING	CC:
FOR	
WILKINSON, REBECCA SUBAN	
<input type="checkbox"/> Urgent <input type="checkbox"/> For Review <input type="checkbox"/> Please Comment <input type="checkbox"/> Please Reply <input type="checkbox"/> Please Recycle	
Comments:	

Total Pages Scanned : 2

Total Pages Confirmed : 2

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	635	12087269328	01:24:09 p.m. 11-10-2009	00:00:32	2/2	1	EC	HS	CP16800

Abbreviations:

HS: Host send
HR: Host receive
WS: Waiting send

PL: Polled local
PR: Polled remote
MS: Mailbox save

MP: Mailbox print
CP: Completed
FA: Fail

TU: Terminated by user
TS: Terminated by system
RP: Report

G3: Group 3
EC: Error Correct

111
165



IDAHO TRANSPORTATION DEPARTMENT

Driver Services • P.O. Box 7129
Boise ID 83707-1129

(208) 334-8735
dmv.idaho.gov

PHONE: (208) 334-8736

WILKINSON, REBECCA SUSAN

NOVEMBER 13, 2009

BOX 4976
KETCHUM

ID 83340

NOTICE OF RESCHEDULED TELEPHONE HEARING

THE DATE FOR THE HEARING REGARDING THE SUSPENSION OR DISQUALIFICATION
OF YOUR DRIVING PRIVILEGES HAS BEEN RESCHEDULED.

PURSUANT TO 18-8002A(7) NO FURTHER CONTINUANCE WILL BE GRANTED.

*THIS RESCHEDULE SHALL NOT OPERATE AS A STAY OF THE SUSPENSION, *
*UNLESS OTHERWISE ORDERED BY THE HEARING OFFICER. ANY TEMPORARY *
*PERMIT ISSUED SHALL EXPIRE THIRTY (30) DAYS AFTER SERVICE OF THE *
*NOTICE OF SUSPENSION. *

THE HEARING OFFICER HAS SCHEDULED YOUR HEARING TO BE CONDUCTED BY
TELEPHONE CONFERENCE CALL ON DECEMBER 01, 2009 AT 2:00MT . THE
TELEPHONE CALL WILL BE PLACED TO:

- () YOU, AT TELEPHONE #:
(XXX) YOUR ATTORNEY: BRIAN ELKINS
AT TELEPHONE#: 208 726-4338
() IF THIS TELEPHONE NUMBER IS INCORRECT, IMMEDIATELY CONTACT THE
ADMINISTRATIVE HEARING STAFF AT (208) 332-2005.

THE HEARING OFFICER PRESIDING AT THE HEARING WILL BE ERIC MOODY

THE HEARING WILL BE CONDUCTED ACCORDING TO THE PROVISIONS OF TITLE
67, CHAPTER 52, IDAHO CODE, AND THE RULES OF PRACTICE AND PROCEDURES
OF THE IDAHO TRANSPORTATION DEPARTMENT. THIS HEARING PROVIDES YOU OR
YOUR ATTORNEY AN OPPORTUNITY TO APPEAL ON YOUR BEHALF. IF YOU NEED
FURTHER ASSISTANCE, PLEASE CALL (208) 332-2005.

PHONE: (208) 334-8736

WILKINSON, REBECCA SUSAN

NOVEMBER 13, 2009

BOX 4976

KETCHUM

ID 83340

SHOW CAUSE LETTER

THE DEPARTMENT RECEIVED YOUR HEARING REQUEST IN A TIMELY MANNER AND FORWARDED THE REQUIRED DOCUMENTS TO THE HEARING EXAMINER SECTION. THE HEARING EXAMINER HAS EXTENDED THE HEARING DATE, PURSUANT TO I.C. 18-8002A(7), DUE TO:

- () DRIVER'S/ATTORNEY'S DATES OF AVAILABILITY
- (XXX) A CONFLICT WITH THE HEARING OFFICER'S SCHEDULE
- () ALLOW TIME FOR THE RECEIPT OF SUBPOENAED EVIDENCE REQUESTED BY THE PETITIONER
- () OTHER:

***** THE SCHEDULING OF THE HEARING SHALL NOT OPERATE *****
***** AS A STAY OF THE SUSPENSION AND ANY TEMPORARY *****
***** PERMIT SHALL EXPIRE THIRTY (30) DAYS AFTER *****
***** SERVICE OF THE NOTICE OF SUSPENSION. *****

THE HEARING WILL BE CONDUCTED ACCORDING TO THE PROVISIONS OF TITLE 67, CHAPTER 52, IDAHO CODE, AND RULES OF PRACTICE AND PROCEDURES OF THE IDAHO TRANSPORTATION DEPARTMENT. THIS HEARING PROVIDES YOU OR YOUR ATTORNEY AN OPPORTUNITY TO APPEAL ON YOUR BEHALF. IF YOU NEED FURTHER ASSISTANCE, PLEASE CALL (208) 332-2005.



HEARING EXAMINER
CC:BRIAN ELKINS

Transmission Report

Date/Time
Local ID 1
Local ID 2

11-13-2009
2083322064

02:12:14 p.m.

Transmit Header Text
Local Name 1
Local Name 2

This document : Confirmed
(reduced sample and details below)
Document size : 8.5"x11"

**DRIVER SERVICES
ADMINISTRATIVE HEARING SECTION
PO BOX 7129
BOISE ID 83707
PHONE: 208 334-8720
FAX: 208 332-2002**

**ADMINISTRATIVE
HEARING SECTION**

Fax

To: Brian Elkins From: MIKE
Fax: 208 726-9328 Date: November 13, 2009
Phone: Pages: 3
Re: RESCHEDULED A.L.S. HEARING CC:
FOR
WILKINSON, REBECCA SUSAN

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

•Comments:

Total Pages Scanned : 3

Total Pages Confirmed : 3

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	731	12087269328	02:11:11 p.m. 11-13-2009	00:00:31	3/3	1	EC	HS	CP24000

Abbreviations:

HS: Host send
HR: Host receive
WS: Waiting send

PL: Polled local
PR: Polled remote
MS: Mailbox save

MP: Mailbox print
CP: Completed
FA: Fail

TU: Terminated by user
TS: Terminated by system
RP: Report

G3: Group 3
EC: Error Correct

114
168

BRIAN E. ELKINS

ATTORNEY AT LAW
A PROFESSIONAL CORPORATION

BITTERROOT SQUARE PROFESSIONAL BUILDING
208 SPRUCE AVENUE NORTH
P.O. BOX 766
KETCHUM, IDAHO 83340

TELEPHONE (208) 726-4338
FACSIMILE (208) 726-9328
E-MAIL: beelkins@cox.net

November 20, 2009

Eric G. Moody, Hearing Officer
Idaho Transportation Department
ALS Hearing Section
P. O. Box 7129
Boise, ID 83707-1129

Re: *In the Matter of the Driving Privileges of Rebecca S. Wilkinson*
License/Identification No. FA127022G
Your File No. 332000025887

Dear Eric:

With respect to the above referenced matter that has been set for an ALS hearing on December 2, 2009 at 2:00 p.m., enclosed please find a DVD that I would like to offer as an exhibit for the Petitioner. It will be necessary for you to review this video to see the factual basis of an argument that will be made by the Petitioner on whether the 15-minute pretest observation period was satisfied by the arresting officer and whether the Petitioner requested the ability to call a lawyer after she submitted to the breath test.

This DVD was obtained by me from the Blaine County Sheriff's Department and is a download of the digital video recorded by the security cameras in the Intoxilyzer room at the Blaine County Sheriff's Department. You need to have the program called "Archive Player" on your computer to review the DVD. The setup for the download for the Archive Player is on the DVD in the event you don't have the program on your computer.

To download Archive Player, insert the DVD into your computer and it should begin to read the DVD and show D:/ and depict the "files currently on the CD." You will see three folders, one of which is the "Archive Player Setup" and that is the folder that you need to click on and follow the setup procedures. Once the Archive Player program has been downloaded, it will show as a program on your computer and you have to open up that player after you complete the download and then you want to open the file named "2009_10_11 02_28_23." Please feel

Eric Moody
November 19, 2009
Page 2

free to call me if you have any questions on this or feel free to talk to Sgt. Jay Davis at the Blaine County Sheriff's Department who provided this DVD to me and walked me through the Archive Player setup.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Brian E. Elkins".

Brian E. Elkins

BEE:cc

Enclosure

pc: Rebecca Wilkinson

Brian E. Elkins
Attorney at Law
P.O. Box 766
Ketchum, Idaho 83340

ERIC G. MOODY, HEARING OFFICER
ALS DIVISION
IDAHO TRANSPORTATION
DEPARTMENT
P. O. BOX 7129
BOISE, ID 83707-1129

ITD REGD NOV 23 2003





IDAHO TRANSPORTATION DEPARTMENT

Driver Services • P.O. Box 7129
Boise ID 83707-1129

10025
(208) 334-8735
dmv.idaho.gov

PHONE: (208) 334-8736

WILKINSON, REBECCA SUSAN

DECEMBER 01, 2009

BOX 4976
KETCHUM

ID 83340



REQUEST FOR ADDITIONAL TIME FOR EVIDENCE

AN ADMINISTRATIVE HEARING WAS HELD ON DECEMBER 01, 2009 , AND A MOTION/REQUEST WAS MADE TO LEAVE THE RECORD OPEN TO ALLOW TIME TO OBTAIN AND PRESENT ADDITIONAL EVIDENCE. THE HEARING OFFICER GRANTED THE MOTION/REQUEST AND THE RECORD WILL BE HELD OPEN FOR 15 DAYS FROM THE DATE THE HEARING WAS HELD. THE MOTION/REQUEST SHALL NOT STAY THE SUSPENSION NOR EXTEND THE EXPIRATION DATE OF THE THIRTY (30) TEMPORARY PERMIT.

IF THE ADDITIONAL EVIDENCE IS RECEIVED PRIOR TO THE EXPIRATION OF THE 15 DAY TIME FRAME, THE RECORD WILL BE CLOSED AT THE TIME THE EVIDENCE IS RECEIVED AND A FINDING OF FACT WILL BE ISSUED.

IF THE ADDITIONAL EVIDENCE IS NOT RECEIVED WITHIN THE 15 DAY TIME FRAME, THE RECORD WILL BE CLOSED AND A FINDING OF FACT WILL BE ISSUED. IF THE EVIDENCE CANNOT BE OBTAINED WITHIN 15 DAYS, PLEASE CONTACT OUR OFFICE PRIOR TO THE EXPIRATION OF THE 15 DAYS TIME FRAME AT (208) 334-8720 TO REQUEST ADDITIONAL TIME TO OBTAIN THE EVIDENCE.

2009

Transmission Report

Date/Time
Local ID 1
Local ID 2

12-01-2009
2083322064

03:37:43 p.m.

Transmit Header Text
Local Name 1
Local Name 2

This document : Confirmed
(reduced sample and details below)
Document size : 8.5"x11"

**DRIVER SERVICES
ADMINISTRATIVE HEARING SECTION
PO BOX 7129
BOISE ID 83707
PHONE: 208 334-8720
FAX: 208 332-2002**

**ADMINISTRATIVE
HEARING SECTION**

Fax

To: Brian Elkins From: MIKE
Fax: 208 726-9328 Date: December 1, 2009
Phone: Pages: 2
Re: 15 Day Evidence Hold For CC:
WILKINSON, REBECCA SUSAN

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

Comments:

Total Pages Scanned : 2

Total Pages Confirmed : 2

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	201	12087269328	03:36:53 p.m. 12-01-2009	00:00:19	2/2	1	EC	H5	CP24000

Abbreviations:

HS: Host send
HR: Host receive
WS: Waiting send

PL: Polled local
PR: Polled remote
MS: Mailbox save

MP: Mailbox print
CP: Completed
FA: Fail

TU: Terminated by user
TS: Terminated by system
RP: Report

G3: Group 3
EC: Error Correct

119

173

BRIAN E. ELKINS
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TELEPHONE: (208) 726-4338
FACSIMILE: (208) 726-9328
E-MAIL: bcelkins@cox.net

December 22, 2009

Via Facsimile: 1-208-332-2002

Attn: Callie
Idaho Transportation Department
ALS Hearing Section
P. O. Box 7129
Boise, ID 83707-1128

DODE

Re: In the Matter of the Suspension of the Driver's License of Rebecca Susan Wilkinson
Your File No. 332000025887
License/Identification No. [REDACTED]

Dear Callie:

Please send an application for restricted driving privileges to Rebecca Wilkinson at P. O.
Box 4976, Ketchum, ID 83340. Thank you for your assistance.

Very truly yours,

Brian E. Elkins

Brian E. Elkins

BEH:cc
pc: Rebecca S. Wilkinson



IDAHO TRANSPORTATION DEPARTMENT

Driver Services • P.O. Box 7129
Boise ID 83707-1129

10025
(208) 334-8735
dmv.idaho.gov

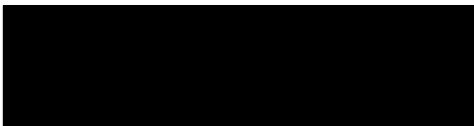
PHONE: (208) 334-8736

WILKINSON, REBECCA SUSAN

JANUARY 12, 2010

BOX 4976
KETCHUM

ID 83340



NOTICE OF TELEPHONE HEARING

A MOTION FOR RECONSIDERATION WAS RECEIVED ON DECEMBER 31, 2009
REGARDING THE FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT WERE
ENTERED ON DECEMBER 17, 2009 . A HEARING WILL BE HELD PURSUANT TO
THE MOTION FOR RECONSIDERATION ON JANUARY 26, 2010 AT 3:00MT .

THE HEARING OFFICER PRESIDING AT THE HEARING WILL BE ERIC MOODY .

IF YOU NEED FURTHER ASSISTANCE, PLEASE CALL (208) 332-2005.

COPI

Transmission Report

Date/Time
Local ID 1
Local ID 2

01-12-2010
2083322064

01:11:57 p.m.

Transmit Header Text
Local Name 1
Local Name 2

This document : Confirmed
(reduced sample and details below)
Document size : 8.5"x11"

**DRIVER SERVICES
ADMINISTRATIVE HEARING SECTION
PO BOX 7129
BOISE ID 83707
PHONE: 208 334-8720
FAX: 208 332-2002**

**ADMINISTRATIVE
HEARING SECTION**

Fax

To: Brian Elkins	From: MIKE
Fax: 208 726-9328	Date: January 12, 2010
Phone:	Pages: 2
Re: Rescheduled A.L.S. HEARING FOR WILKINSON, REBECCA SUSAN	CC:
<input type="checkbox"/> Urgent <input type="checkbox"/> For Review <input type="checkbox"/> Please Comment <input type="checkbox"/> Please Reply <input type="checkbox"/> Please Recycle	
•Comments:	

Total Pages Scanned : 2

Total Pages Confirmed : 2

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	293	12087269328	01:11:10 p.m. 01-12-2010	00:00:15	2/2	1	EC	HS	CP24000

Abbreviations:

HS: Host send
HR: Host receive
WS: Waiting send

PL: Polled local
PR: Polled remote
MS: Mailbox save

MP: Mailbox print
CP: Completed
FA: Fail

TU: Terminated by user
TS: Terminated by system
RP: Report

G3: Group 3
EC: Error Correct

122
1210

Transmission Report

Date/Time
Local ID 1
Local ID 2

01-12-2010
2083322064

01:13:04 p.m.

Transmit Header Text
Local Name 1
Local Name 2

This document : Confirmed
(reduced sample and details below)
Document size : 8.5"x11"

DRIVER SERVICES
ADMINISTRATIVE HEARING SECTION
PO BOX 7129
BOISE ID 83707
PHONE: 208 334-8720
FAX: 208 332-2002

ADMINISTRATIVE
HEARING SECTION

Fax

To: Brian Ekins From: Mike
Fax: 208 726-9328 Date: January 12, 2010
Phone: Pages: 2
Re: CIVIL SUBPOENA REQUEST CC:
FOR WILKINSON, REBECCA
SUSAN A.L.S. HEARING

Comments:

****IMPORTANT INFORMATION****

Attached, please find the Subpoena that has been issued, per your request, for the A.L.S. hearing on the above person. **YOUR OFFICE** will be responsible for serving the Subpoena. The Subpoena must be served **at least 72 hours prior to the hearing**. Please fax a copy of the Certificate of Service prior to the scheduled time of the hearing to (208) 332-2002.

Thank You

Total Pages Scanned : 2

Total Pages Confirmed : 2

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	295	12087269328	01:12:10 p.m. 01-12-2010	00:00:22	2/2	1	EC	HS	CP24000

Abbreviations:

HS: Host send
HR: Host receive
WS: Waiting send

PL: Polled local
PR: Polled remote
MS: Mailbox save

MP: Mailbox print
CP: Completed
FA: Fall

TU: Terminated by user
TS: Terminated by system
RP: Report

G3: Group 3
EC: Error Correct

177
123

Transmission Report

Date/Time
Local ID 1
Local ID 2

01-14-2010
2083322064

10:17:28 a.m.

Transmit Header Text
Local Name 1
Local Name 2

This document : Confirmed
(reduced sample and details below)
Document size : 8.5"x11"

DRIVER SERVICES
ADMINISTRATIVE HEARING SECTION
PO BOX 7129
BOISE ID 83707
PHONE: 208 334-8720
FAX: 208 332-2002

**ADMINISTRATIVE
HEARING SECTION**

Fax

To: Brian Elkins	From: MIKE
Fax: 208 726-9328	Date: January 14, 2010
Phone:	Pages: 2
Re: Stay Order For	CC:
WILKINSON, REBECCA SUSAN	

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

Comments:

Total Pages Scanned : 2

Total Pages Confirmed : 2

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	360	12087269328	10:16:36 a.m. 01-14-2010	00:00:21	2/2	1	EC	HS	CP19200

Abbreviations:

HS: Host send
HR: Host receive
WS: Waiting send

PL: Polled local
PR: Polled remote
MS: Mailbox save

MP: Mailbox print
CP: Completed
FA: Fail

TU: Terminated by user
TS: Terminated by system
RP: Report

G3: Group 3
EC: Error Correct

178
124

IN THE IDAHO TRANSPORTATION DEPARTMENT

STATE OF IDAHO

IN THE MATTER OF THE)	IDAHO D.L. No.FA127022G
DRIVING PRIVILEGES OF	)	FILE No. 332000025887
)	
	)	<u>AMENDED FINDINGS OF FACT AND</u>
REBECCA SUSAN WILKINSON	)	CONCLUSIONS OF LAW AND
<hr/>	)	ORDER

This matter initially came on for Administrative License Suspension (ALS) hearing on December 02, 2009, by telephone conference. Brian Elkins, Attorney at Law, represented Wilkinson. A notice of reconsideration was filed On December 31, 2000. The reconsideration hearing came for hearing on January 26, 2010. Mr. Elkins represented Wilkinson.

The suspension set out in the Notice of Suspension served pursuant to Idaho Code §18-8002A* is **SUSTAINED.**

EXHIBIT LIST[†]

The hearing examiner received the following exhibits into evidence as part of the record of the proceeding:

1. Notice of suspension and temporary permit
2. Evidentiary test results
3. Sworn statement
4. Copy of petitioner's driver's license
5. Envelope from law enforcement agency
6. Certificate of receipt of law enforcement documents

7. Petitioner's hearing request
8. Petitioner's driving record
9. Response to request for discovery
10. Subpoena-duces tecum
11. Subpoena-civil
12. Subpoena-civil
13. Stay order
14. Subpoena-civil
15. Certificate of service
16. Subpoena-civil
17. Certificate of service
18. Subpoena-civil
19. Certificate of service
20. Subpoena-civil
21. Certificate of service
22. Stay order
23. Findings of Fact and Conclusions of Law and Order

- A. Instrument operations logs
- B. Return of service
- C. DVD
- D. Correspondence
- E. Photo-number 1
- F. Photo-number 2
- G. Photo-number 3
- H. Photo-number 4
- I. Photo-number 5
- J. Bail bond receipt
- K. DVD
- L. Petitioner's written arguments
- M. CD-R

- N. Correspondence
- O. Motion for reconsideration
- P. Supplement to motion for reconsideration
- Q. Stipulation to suppress BrAC results and states motion to dismiss
- R. Court record
- S. Subpoena-civil
- T. Argument

**THE HEARING EXAMINER HAS TAKEN JUDICIAL NOTICE OF THE
FOLLOWING ITEMS:**

1. Records regularly maintained by ITD⁺
2. IDAPA[§] Rules and manuals
3. ISP^{**} standards and procedures⁺⁺ for breath testing instruments
4. Idaho Statutes, city, and county ordinances and procedures
5. Reported Court Decisions
6. NHTSA⁺⁺ driving while impaired and SFSTs^{§§} testing manuals

ADMINISTRATIVE PROCEEDINGS^{*}**

Mr. Elkins' comments and arguments on December 02, 2009:

1. Wilkinson was not observed in compliance with the ISP Forensic Services SOP Section 3.1.
2. Evidence submitted shows Officer Davis and Wilkinson's location.
3. Exhibit 2 shows the observation period started at 2:26.
4. Exhibit 3 notes a wristwatch was used to time the observation period.
5. The record lacks how the wristwatch's time corresponds to Intoxilyzer 5000 EN's clock.
6. Considering Exhibit 2's 2:26, the fifteen-minute observation period would end at 2:41.
7. Exhibit 2 notes Wilkinson's first subject test was at 2:39.
8. Exhibit 3 provides Wilkinson's breath test results at 2:43.

9. Officer Davis used his wristwatch to establish the 2:43 time.
10. The Intoxilyzer 5000 EN displays two different subject test times.
11. It is suspicious Officer Davis noted one time for Wilkinson's two subject tests.
12. The record shows a non-compliance with the observation period.
13. Wilkinson was not closely observed.

Officer Garth Davis' testimony on January 26, 2010:

1. Have been trained how to monitor a driver prior to a breath test.
2. On January 07, 2010, there was a criminal DUI hearing regarding the fifteen-minute observation period where a CD was played.
3. He and the prosecutor previously reviewed and discussed the CD.
4. He and the prosecutor agreed the requirements of a close fifteen-minute observation period were not satisfied.
5. Multiple times during the observation period, his back was towards Wilkinson.
6. Since Wilkinson was not properly monitored, the breath test results were excluded from the criminal proceeding.
7. Agree with the criminal proceeding conclusions.
8. Will admit that his back was turned to Wilkinson multiple times.
9. Wilkinson was observed for sixteen minutes and forty-three seconds.

Mr. Elkins' comments and arguments on January 26, 2010:

1. Request a review the motion to reconsider.
2. Officer Davis noted Wilkinson was not properly monitored.
3. Officer Davis noted his back was turned multiple times towards Wilkinson during the observation period.
4. Court cases note the police officer is to be alert and monitor the driver fifteen minutes prior to the breath test.
5. The police officer is to keep the driver within their peripheral view during the monitoring period.

6. Officer Davis' back towards Wilkinson is not within ISP Forensic Services SOPs requirements.
7. There is now a local decision in the criminal proceeding showing Wilkinson was not properly observed.

**ISSUES RAISED AT HEARING IN ADDITION TO ISSUES SET FORTH IN
IDAHO CODE §18-8002A⁺⁺⁺**

1. Was Wilkinson properly monitored prior to her breath test? (12/02/09)
2. Was Wilkinson denied access to an attorney? (12/02/09)
3. Additional issues noted in motion for reconsideration hearing regarding the monitoring period . (1/26/10, see section 9)

FINDINGS OF FACT

I, having heard the issues raised by the driver; having considered the exhibits admitted as evidence; having considered the matter herein; and being advised in the premises and the law, make the following Findings of Fact:

PURSUANT TO IDAHO CODE §18-8002A(7) THE PETITIONER HAS THE BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE REGARDING ALL IDAHO CODE §18-8002A STANDARDS AND ALL ISSUES RAISED BY THE PETITIONER.

1.

**DID OFFICER GARTH DAVIS HAVE LEGAL CAUSE TO STOP THE
VEHICLE WILKINSON WAS DRIVING?**

1. Officer Davis observed the vehicle driven by Wilkinson fail to maintain the vehicle's lane of travel by crossing the center and lane divider lines

- in violation of Idaho Code §§49-630 and 49-637.
2. Officer Davis had legal cause to stop the vehicle driven by Wilkinson.

2.

DID OFFICER DAVIS HAVE LEGAL CAUSE TO BELIEVE WILKINSON VIOLATED IDAHO CODE §18-8004?

1. Officer Davis observed Wilkinson driving a motor vehicle.
2. Wilkinson exhibited the following behaviors:
 - a. Smelled of an alcoholic beverage
 - b. Admitted to consuming alcoholic beverages
 - c. Slurred speech
 - d. Glassy eyes
 - e. Bloodshot eyes
3. Wilkinson met or exceeded the minimum decision points on the following SFSTs:
 - a. The horizontal gaze nystagmus
 - b. The 9-step walk and turn
 - c. The one leg stand
4. Officer Davis had sufficient legal cause to arrest Wilkinson and request an evidentiary test.

3.

DID THE EVIDENTIARY TEST RESULTS INDICATE A VIOLATION OF IDAHO CODE §§18-8004, 18-8004C, OR 18-8006?

1. The analyses of Wilkinson's' breath samples indicated a BrAC^{***} of .165/.151.
2. Wilkinson was in violation of Idaho Code §18-8004.

4.

WAS THE EVIDENTIARY TEST PERFORMED IN COMPLIANCE WITH ALL REQUIREMENTS SET FORTH IN IDAHO CODE AND ISP FORENSIC

SERVICES SOPs?

1. Officer Davis' affidavit states Wilkinson's evidentiary breath test was performed in compliance with Idaho Code and ISP Forensic Services SOPs.
2. Wilkinson's evidentiary breath test was performed in compliance with Idaho Code and ISP Forensic Services SOPs.

5.

DID THE EVIDENTIARY TESTING INSTRUMENT FUNCTION PROPERLY WHEN THE TEST WAS ADMINISTERED?

1. The evidentiary testing instrument used to test Wilkinson's breath sample completed a valid simulator solution check at 02:37 hours on October 11, 2009.
2. The valid simulator solution check approved the instrument for evidentiary testing in accordance with ISP Forensic Services SOP.
3. The evidentiary testing instrument functioned properly when the test was administered.

6.

WAS WILKINSON ADVISED OF THE POSSIBLE SUSPENSION OF HER IDAHO DRIVING PRIVILEGE?

1. Wilkinson was played the Idaho Code §§18-8002 and 18-8002A advisory recording prior to submitting to the evidentiary test.
2. Although Wilkinson was interrupted several times when she was being advised of a recording, the DVD reveals an eventual completion of the recording and Officer Davis and Wilkinson reviewing the notice of suspension form prior to Wilkinson submitting to evidentiary testing.
3. Statute and case law only provides a substantial advisement of the notice of suspension form and fails to show a violation occurs when a driver is interrupted during the reading or when the recording of the notice of suspension is being played.

4. Wilkinson was advised of the consequences of refusing or failing evidentiary testing pursuant to Idaho Code §§18-8002 and 18-8002A.

7.

WAS WILKINSON PROPERLY MONITORED PRIOR TO HER BREATH TEST?

1. Wilkinson was monitored prior to her breath test in compliance with ISP Forensic Services SOPs and Idaho Code.
2. It is noted the times in the record for the fifteen-minute observation period do not correspond to each other.
3. However, upon review of the DVD, when Officer Davis and Wilkinson are first observed entering the room up until the time Wilkinson's first subject test, the times shown on the DVD provide fifteen minutes had elapsed prior to Wilkinson's breath test.
4. Therefore, correlating times from a wristwatch to a breath-testing instrument's clock is an irrelevant issue.
5. ISP Forensic Services SOP Section 3.1 states during *the monitoring period the subject should not be allowed to smoke, drink, eat, or belch/burp*.
6. The SOPs do not mandate the driver should be advised of what is set forth in ISP Forensic Services SOP Section 3.1.
7. Since Officer Davis did not discover any foreign material in Wilkinson's mouth there was no need to restart the fifteen-minute observation period.
8. Case law allows non-certified jail personnel to monitor a driver during the fifteen-minute observation period.
9. Wilkinson failed to submit any proof that the female jailer could not have properly observed Wilkinson and informed Officer Davis of any irregularities occurring when the jailer was patting down Wilkinson.
10. There is an allegation (appears) that Wilkinson had flicked something from her mouth during the observation period but proof by the

preponderance of the evidence has not been provided into the record to support this assumption.

11. Wilkinson has provided photos and numerous sequences of times when Officer Davis was not facing Wilkinson during the observation period and the distance where Officer Davis remained during the majority of the observation period.
12. The DVD strongly shows Officer Davis having the capability in using other sensory methods during the observation period that would have detected the possibility of any actions by Wilkinson introducing any foreign matter during the observation period.
13. An opportunity existed at this ALS hearing for Officer Davis to appear by subpoena as permitted by Idaho Code §18-8002A(7).
14. Officer Davis' appearance would clarify, explain, answer questions, and provide input on how he complied with ISP Forensic Services SOPs in monitoring Wilkinson prior to her evidentiary breath test.
15. Even though the subpoena was properly served and a phone number was provided to contact Officer Davis during the ALS hearing, shortly prior to Wilkinson's ALS hearing a request was made in not having Officer Davis appear.
16. Wilkinson attempting to interpret her provided evidence to meet her burden of proof is not sufficient to overcome Officer Davis' standard (boiler point) language provided in Exhibit 3.
17. Furthermore, no local case law has been provided in showing the method used to observe drivers at the Blaine County Jail or Officer Davis violates the fifteen-minute observation period.
18. Upon review of Exhibit 2 Wilkinson's two subject tests differed by 0.014 and were within ISP Forensic Services SOP Sections 3.2 and 3.2.3 requirements.
20. Exhibit 2's BrAC results strongly refute the possibility of an improper fifteen-minute observation period occurred before Wilkinson was administered an evidentiary breath test

21. The record as submitted demonstrates a compliance with ISP Forensic Services SOPs in properly monitoring and observing Wilkinson prior to Wilkinson's evidentiary breath test.

8.

WAS WILKINSON DENIED ACCESS TO AN ATTORNEY?

1. Statute specifically sets forth a driver does not have a right to an attorney prior to any evidentiary testing.
2. The notice of suspension in section 1 had informed Wilkinson of this denial of an attorney prior to evidentiary testing.
3. The DVD also shows Officer Davis explaining to Wilkinson that she does not have a right to an attorney prior to evidentiary testing.
4. Wilkinson has not submitted any proof in showing a request to contact her attorney was made after her evidentiary breath test.
5. Likewise, it reasonable to deduce that Officer Davis or a jailer did offer an opportunity for Wilkinson to call an attorney after Wilkinson's evidentiary breath test.
6. It appears if Wilkinson was able to call a bondsman, Wilkinson had the same chance to call an attorney.
7. Wilkinson failed to meet her burden in showing she was denied access to an attorney after failing an evidentiary breath test.

9.

ADDITIONAL ISSUES NOTED IN MOTION FOR RECONSIDERATION HEARING REGARDING THE MONITORING PERIOD.

1. Case law has found an operator can use other senses besides sight to meet the requirements of the monitoring period.
2. Exhibit M does not provide for any obstructions or distractions where Officer Davis could not have used any of his senses to monitor Wilkinson fifteen minutes prior to her breath test.

3. Even if Officer Davis' back was towards Wilkinson multiple times during the monitoring period, Officer Davis had the capability of using other senses to monitor Wilkinson, including, but not limited to, an additional assistance from an echo in the room during the monitoring period.
4. Officer Davis and the prosecutor agreeing to vacate the criminal proceeding is a separate matter and does not have any affect in this civil proceeding pursuant to Idaho Code §18-8002A(7).
5. Officer Davis monitored Wilkinson as provided in ISP Forensic Services SOPs and Idaho case law.

CONCLUSION OF LAW

CONFLICTING FACTS, IF ANY, WERE CONSIDERED AND REJECTED IN FAVOR OF THE FOREGOING CITED FACTS. BASED UPON THE FOREGOING FINDINGS OF FACT, I CONCLUDE THAT ALL OF THE REQUIREMENTS FOR SUSPENSION OF THE PETITIONER'S DRIVING PRIVILEGES SET FORTH IN IDAHO CODE §§18-8002 AND 18-8002A WERE COMPLIED WITH IN THIS CASE.

THE FOLLOWING AMENDED ORDER IS RENDERED:

ORDER

WILKINSON'S ABSOLUTE NO DRIVING SUSPENSION WAS IN EFFECT EIGHTEEN DAYS BEFORE THE STAY WAS GRANTED. EIGHTEEN DAYS WILL BE CREDITED TO WILKINSON'S OVER ALL SUSPENSION.

THE STAY ORDER IS HEREBY QUASHED AND THE SUSPENSION SET FORTH IN THE NOTICE OF SUSPENSION

**FOR FAILURE OF EVIDENTIARY TESTING SERVED BY
OFFICER DAVIS ON OCTOBER 11, 2009, SHALL BE
REINSTATED FOR 72 DAYS COMMENCING ON
FEBRUARY 25, 2010, AND REMAIN IN EFFECT
THROUGH MAY 08, 2010.**

DATED this 11th day of February 2010

A handwritten signature in black ink, appearing to read "Eric G. Moody". The signature is fluid and cursive, with the first name "Eric" and last name "Moody" clearly distinguishable.

Eric G. Moody

ADMINISTRATIVE HEARING EXAMINER

Endnotes

* Idaho's Implied Consent Statute

† Idaho Transportation Department's (ITD hereafter) exhibits are numeric, Petitioner's exhibits are alpha

‡ Idaho Transportation Department

§ Idaho's Administrative Procedure Act

** Idaho State Police

†† Hereafter SOPs

†† National Highway Transportation Safety Administration

§§ Standardized field sobriety tests

*** Argument and testimony is summarized from record of hearing

††† Issues addressed under Idaho Code §18-8002A(7) will not be repeated under Petitioner's issues

††† Breath Alcohol Concentration

FINAL ORDER

(Hearings pursuant to section 18-8002A, I.C.)

This is a final order of the Department.

A motion for reconsideration may be filed with the Idaho Transportation Department's Administrative License Suspension Hearing Unit, PO Box 7129, Boise, ID 83707-1129 within fourteen (14) days of the issue date of this order. If the hearing officer fails to act upon this motion within twenty-one (21) days of its receipt, the motion will be deemed denied.

Or, pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition for judicial review in the district court of the county in which:

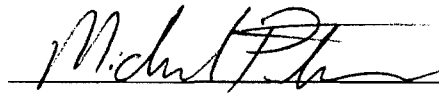
1. A hearing was held;
2. The final agency actions were taken; or
3. The party seeking review of the order resides.

An appeal must be filed within twenty-eight (28) days of the issue date of this final order. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 11th day of February 2010, I mailed a true and accurate copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER by depositing the same in the United States mail, postage prepaid, addressed to:

Brian E. Elkins
Attorney at Law
PO Box 766
Ketchum, Idaho 83340



BRIAN E. ELKINS, P.C.
Attorney at Law
208 Spruce Avenue North
P. O. Box 766
Ketchum, Idaho 83340
Telephone (208) 726-4338
Facsimile (208) 726-9328
E-mail: beelkins@cox.net
ISB No. 3150

Attorney for Petitioner

SERVICE COPY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT COURT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

REBECCA S. WILKINSON,)	
	)	Case No. CV-2010- <u>10000123</u>
Petitioner,)	
v.	)	PETITION FOR JUDICIAL REVIEW
)	
STATE OF IDAHO, DEPARTMENT	)	License/Identification No. FA127022G
OF TRANSPORTATION,	)	ITD File Number: 332000025887
)	
Respondent.	)	Fee Category: L-3
	)	Fee: \$88.00

The Petitioner, Rebecca Susan Wilkinson, by and through her attorney of record, Brian E. Elkins, petitions this Court for judicial review pursuant to Idaho Code § 67-5270, *et seq.* and I.R.C.P. 84, as follows:

- (1) The name of the agency for whose action judicial review is sought is the State of Idaho, Department of Transportation, Administrative License Suspension Hearing Section (ITD/ALS).
- (2) The District Court to which this petition is taken is the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Blaine since the

Petitioner, Rebecca S. Wilkinson (Wilkinson), resides in Blaine County.

- (3) The action which is the subject of this judicial review is the purported "sustained" Order by the ALS suspending the driving privileges of Wilkinson that were brought pursuant to Idaho Code § 18-8002A (ALS statute) for 90 days, the first 30 days of which are absolute (meaning no driving privileges whatsoever); the ALS proceeding is initiated by the Notice of Suspension for Failure of Evidentiary Testing (NOS Form) served on Wilkinson following her arrest for driving while under the influence of alcohol in violation of Idaho Code § 18-8004 (DUI).
- (4) Wilkinson was arrested for DUI on October 11, 2009 by Officer Garth Davis of the Hailey Police Department. Following her arrest, Wilkinson was transported to the Blaine County Sheriff's Department where she was asked to submit to a breath test on an Intoxilyzer 5000EN Breath Testing Machine (BrAC) and it was alleged that her breath test results were in excess of Idaho's legal limit of .08.
- (5) Pursuant to the ALS statute, Officer Davis seized Wilkinson's Idaho driver's license, no. [REDACTED] and, also consistent with the ALS statute, served on Wilkinson the NOS Form.
- (6) Under the ALS statute, Wilkinson timely requested an administrative hearing before the ITD, ALS Hearing Section, whereupon the matter was set for an ALS hearing before ALS Hearing Officer Eric G. Moody.
- (7) By virtue of the fact that Officer Davis was unavailable for one of the scheduled ALS hearings, the matter was continued until the hearing that took place on December 2, 2009. During the time that the ALS proceeding was continued, ALS Hearing Officer Eric Moody agreed to enter a stay of the suspension of Wilkinson's driving privileges since, by operation of law under the ALS statute, she would have suffered a suspension 30 days following the service of the NOS Form which would have meant a commencement of her suspension on or about November 10, 2009.

- (8) At the ALS hearings, Wilkinson's counsel submitted a number of exhibits that were admitted into the record, the most notable of which is Petitioner's Exhibit M, a CD-R recording of the proceedings that took place approximately 30 minutes before, and during, the time that Wilkinson submitted to the BrAC test. Following the ALS hearing that was conducted by a telephone conference call on December 2, 2009, Wilkinson asked that the record remain open so that she could be afforded an opportunity to submit a written argument in support of vacating the suspension.
- (9) On December 17, 2009 ALS Hearing Examiner Eric G. Moody issued his Findings of Fact and Conclusions of Law and Order (Decision) ruling that the suspension set out in the NOS Form would be "sustained." A copy of the Decision is attached hereto as Exhibit A and incorporated herein by reference. The heading before the ITD and case caption are set forth on Exhibit A.
- (10) According to the terms of the Decision, the ALS hearing officer quashed the stay order, such that Wilkinson's 90-day ALS suspension would commence on December 28, 2009.
- (11) On December 31, 2009 Wilkinson timely filed a Request for Reconsideration before ALS Hearing Officer Eric G. Moody pursuant to IDAPA 39.02.72.600 and pursuant to Idaho Code § 67-5246(4).
- (12) However, ALS Hearing Officer Eric G. Moody set the matter for another hearing which was held on January 26, 2010 and additional evidence was offered into the record including, but not limited to,
- (a) Officer Garth Davis testified at said hearing.
 - (b) A Stipulation to Suppress BrAC results and State's Motion to Dismiss in the companion criminal case entitled *State of Idaho v. Rebecca S. Wilkinson*, Blaine County Case No. CR-09-2929, where the parties stipulated that the BrAC results obtained from Wilkinson on October 11, 2009 would be suppressed from evidence for failure of the operator, Garth

Davis, to observe and monitor the Defendant during the requisite 15 minutes before she submitted to the BrAC test.

- (c) An Order of Dismissal was entered into the ALS record where the companion DUI case against Wilkinson in Blaine County Case No. CR-09-2929 was dismissed by Blaine County Magistrate R. Ted Israel after finding that Wilkinson's BrAC results "be suppressed from evidence for failure of the arresting officer/operator of the Intoxilyzer 5000 Breath Testing Machine, to properly observe and monitor the Defendant for 15 minutes prior to the time that she submitted to the breath test."
- (13) While the matter was pending before ITD/ALS Hearing Section on Wilkinson's Request for Reconsideration and since her driving privileges became suspended on December 28, 2009, on January 12, 2010 Wilkinson filed with the ALS Hearing Section a Motion for Stay of Suspension of Driving Privileges and on January 14, 2010 ITD issued a "PENDING ACTION" notifying Wilkinson that her ALS suspension was going to be "TEMPORARILY STOPPED: PENDING ADMINISTRATIVE HEARING AND HEARING OFFICER'S DECISION."
- (14) On February 11, 2010, the ALS Hearing Officer issued his Amended Decision sustaining the suspension of Wilkinson's driving privileges under the ALS statute.
- (15) During the hearings on this matter before the ALS hearing officer, oral evidence was offered along with argument in colloquy that were presented to the ALS hearing officer. Those hearings were recorded by ALS. Based upon past experience, counsel for Wilkinson believes and therefor alleges that Hedrick Court Reporting possesses such recordings and that their address is P. O. Box 578, Boise, ID 83701.

- (16) A Statement of Issues for Judicial Review that Wilkinson intends to assert include, but are not necessarily limited to, the following:
- (a) Did Title 18, Chapter 80, of the Idaho Code, including but not limited to Idaho Code § 18-8002A, provide a basis to sustain the ALS suspension of driving privileges?
 - (b) Pursuant to I. C. § 18-8002A(7), whether the arresting officer, Garth Davis, complied with the requirements of Idaho Code § 18-8004(4) and conducted the BrAC test on Wilkinson in compliance with the standard operating procedures and operator manual for the breath testing device used in this case; to wit: whether Officer Davis complied with the 15-minute observation period and properly monitored and observed Wilkinson prior to the time that she submitted to the BrAC test.
 - (c) Whether Wilkinson's due process rights were violated when Officer Garth Davis would not allow Wilkinson to call her attorney, despite repeated requests to do so, after she submitted to the BrAC test as recognized in *State v. Carr*, 128 Idaho 181. Accordingly, did ALS Hearing Officer Eric G. Moody err when he ruled against Wilkinson on that issue?
 - (d) Was the decision sustaining the ALS in violation of I. C. § 67-5279?
- (17) A transcript of the ALS proceedings is requested.
- (18) By reason of the acts of the Respondent it has been necessary for Wilkinson to retain the services of an attorney. Wilkinson has incurred and will continue to incur costs and attorney's fees. Wilkinson requests Respondent be ordered to pay her reasonable attorney's fees and costs incurred in this action. Should the matter proceed by default, reasonable attorney's fees shall be Three Thousand Dollars (\$3,000). Wilkinson is entitled to an award of attorney's fees and costs under I. C. § 12-117, I.R.C.P. 54(e) and any other applicable rule, statute or case law.

PRAYER FOR RELIEF

WHEREFORE, Petitioner requests the following relief:

- (1) The Court enter an order staying the suspension of the Petitioner's driving privileges and that the order provide that the Petitioner's driving privileges will remain in effect and valid until a decision is issued by the Court on the Petition for Judicial Review.
- (2) That based upon the entire record in this case the Court find that the ITD/ALS order is in violation of statutory provisions, state and federal constitutional provisions, is not supported by substantial evidence in the record as a whole, and that the ALS hearing examiner's decision is arbitrary, capricious or an abuse of discretion.
- (3) The Court set aside the Amended Decision of ALS Hearing Examiner Eric Moody dated February 11, 2010 and that the matter be remanded to ITD/ALS with instructions to vacate the ALS suspension of Wilkinson's driving privileges.
- (4) For an order declaring that the ALS hearing officer erred as a matter of law in his interpretation of Idaho Code §§ 18-8002A, 18-8004(4) and 67-5270, *et seq.*
- (5) For an order finding that the ALS hearing officer acted without a reasonable basis in fact or law in sustaining the ALS suspension and the Decision was arbitrary, capricious, or an abuse of discretion.
- (6) For an award of attorney's fees and costs.
- (5) For an order or judgment granting such other and further relief as the Court deems just and equitable.

DATED this 18 day of February, 2010.


BRIAN E. ELKINS

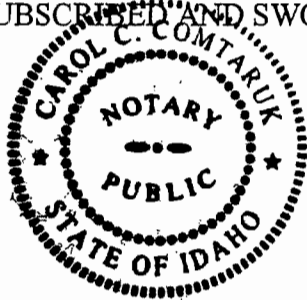
VERIFICATION


STATE OF IDAHO)
) ss.
County of Blaine)

I, BRIAN E. ELKINS, being first duly sworn upon oath, hereby depose and state: I am the attorney for Petitioner, Rebecca S. Wilkinson, in the above-entitled action; that service of the Petition has been made upon the Idaho Transportation Department pursuant to I.R.C.P. 5(f); that the Clerk of the administrative agency will be paid the estimated fee for the preparation of the transcript; that the Clerk of the agency will be paid the estimated fee for the preparation of the record.


BRIAN E. ELKINS

SUBSCRIBED AND SWORN to before me this 18th day of February, 2010.



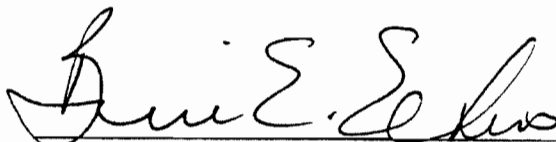

Notary Public for Idaho
Residing at Boise
Commission Expires 3.25.2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of February, 2010 I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

Driver Services/ALS Hearing Section
Idaho Transportation Department
P. O. Box 7129
Boise, Id. 83707-1129

☒ Mailed
☐ Hand-Delivered
☐ Faxed to Fax Number 208.332.7810
☐ Faxed and mailed


BRIAN E. ELKINS

crim\wilkinson-JudicialReview.pet

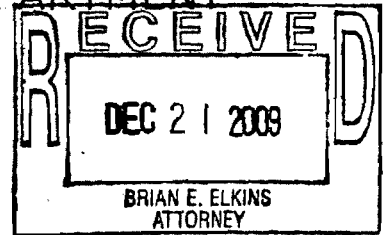
PETITION FOR JUDICIAL REVIEW

- 7

200
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IN THE IDAHO TRANSPORTATION DEPARTMENT

STATE OF IDAHO



IN THE MATTER OF THE) IDAHO D.L. No. FA127022G
DRIVING PRIVILEGES OF) FILE No. 332000025887
)
) **FINDINGS OF FACT AND**
REBECCA SUSAN WILKINSON) **CONCLUSIONS OF LAW AND**
) **ORDER**

This matter came on for Administrative License Suspension (ALS) hearing on December 02, 2009, by telephone conference. Brian Elkins, Attorney at Law, represented Wilkinson.

The suspension set out in the Notice of Suspension served pursuant to Idaho Code §18-8002A* is **SUSTAINED**.

EXHIBIT LIST[†]

The hearing examiner received the following exhibits into evidence as part of the record of the proceeding:

1. Notice of suspension and temporary permit
2. Evidentiary test results
3. Sworn statement
4. Copy of petitioner's driver's license
5. Envelope from law enforcement agency
6. Certificate of receipt of law enforcement documents
7. Petitioner's hearing request
8. Petitioner's driving record
9. Response to request for discovery

☒ DICTATION ☐ FILE
☒ COPY ☐ MAILED
TO Bex Wilkinson
ON 12-22-09 BY h

EXHIBIT A

10. Subpoena-duces tecum
11. Subpoena-civil
12. Subpoena-civil
13. Stay order
14. Subpoena-civil
15. Certificate of service
16. Subpoena-civil
17. Certificate of service
18. Subpoena-civil
19. Certificate of service
20. Subpoena-civil
21. Certificate of service

- A. Instrument operations logs
- B. Return of service
- C. DVD
- D. Correspondence
- E. Photo-number 1
- F. Photo-number 2
- G. Photo-number 3
- H. Photo-number 4
- I. Photo-number 5
- J. Bail bond receipt
- K. DVD
- L. Petitioner's written arguments
- M. CD-R
- N. Correspondence

**THE HEARING EXAMINER HAS TAKEN JUDICIAL NOTICE OF THE
FOLLOWING ITEMS:**

1. Records regularly maintained by ITD[†]

2. IDAPA[§] Rules and manuals
3. ISP^{**} standards and procedures⁺⁺ for breath testing instruments
4. Idaho Statutes, city, and county ordinances and procedures
5. Reported Court Decisions
6. NHTSA^{**} driving while impaired and SFSTs^{§§} testing manuals

ADMINISTRATIVE PROCEEDINGS^{*}**

Mr. Elkins' comments and arguments:

1. Wilkinson was not observed in compliance with the ISP Forensic Services SOP Section 3.1.
2. Evidence submitted shows Officer Davis and Wilkinson's location.
3. Exhibit 2 shows the observation period started at 2:26.
4. Exhibit 3 notes a wristwatch was used to time the observation period.
5. The record lacks how the wristwatch's time corresponds to Intoxilyzer 5000 EN's clock.
6. Considering Exhibit 2's 2:26, the fifteen-minute observation period would end at 2:41.
7. Exhibit 2 notes Wilkinson's first subject test was at 2:39.
8. Exhibit 3 provides Wilkinson's breath test results at 2:43.
9. Officer Davis used his wristwatch to establish the 2:43 time.
10. The Intoxilyzer 5000 EN displays two different subject test times.
11. It is suspicious Officer Davis noted one time for Wilkinson's two subject tests.
12. The record shows a non-compliance with the observation period.
13. Wilkinson was not closely observed.

ISSUES RAISED AT HEARING IN ADDITION TO ISSUES SET FORTH IN

IDAHO CODE §18-8002A⁺⁺⁺

1. Was Wilkinson properly monitored prior to her breath test?
2. Was Wilkinson denied access to an attorney?

FINDINGS OF FACT

I, having heard the issues raised by the driver; having considered the exhibits admitted as evidence; having considered the matter herein; and being advised in the premises and the law, make the following Findings of Fact:

PURSUANT TO IDAHO CODE §18-8002A(7) THE PETITIONER HAS THE BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE REGARDING ALL IDAHO CODE §18-8002A STANDARDS AND ALL ISSUES RAISED BY THE PETITIONER.

1.

DID OFFICER GARTH DAVIS HAVE LEGAL CAUSE TO STOP THE VEHICLE WILKINSON WAS DRIVING?

1. Officer Davis observed the vehicle driven by Wilkinson fail to maintain the vehicle's lane of travel by crossing the center and lane divider lines in violation of Idaho Code §§49-630 and 49-637.
2. Officer Davis had legal cause to stop the vehicle driven by Wilkinson.

2.

DID OFFICER DAVIS HAVE LEGAL CAUSE TO BELIEVE WILKINSON VIOLATED IDAHO CODE §18-8004?

1. Officer Davis observed Wilkinson driving a motor vehicle.
2. Wilkinson exhibited the following behaviors:
 - a. Smelled of an alcoholic beverage
 - b. Admitted to consuming alcoholic beverages
 - c. Slurred speech
 - d. Glassy eyes
 - e. Bloodshot eyes

3. Wilkinson met or exceeded the minimum decision points on the following SFSTs:
 - a. The horizontal gaze nystagmus
 - b. The 9-step walk and turn
 - c. The one leg stand
4. Officer Davis had sufficient legal cause to arrest Wilkinson and request an evidentiary test.

3.

DID THE EVIDENTIARY TEST RESULTS INDICATE A VIOLATION OF IDAHO CODE §§18-8004, 18-8004C, OR 18-8006?

1. The analyses of Wilkinson's' breath samples indicated a BrAC^{***} of .165/.151.
2. Wilkinson was in violation of Idaho Code §18-8004.

4.

WAS THE EVIDENTIARY TEST PERFORMED IN COMPLIANCE WITH ALL REQUIREMENTS SET FORTH IN IDAHO CODE AND ISP FORENSIC SERVICES SOPs?

1. Officer Davis' affidavit states Wilkinson's evidentiary breath test was performed in compliance with Idaho Code and ISP Forensic Services SOPs.
2. Wilkinson's evidentiary breath test was performed in compliance with Idaho Code and ISP Forensic Services SOPs.

5.

DID THE EVIDENTIARY TESTING INSTRUMENT FUNCTION PROPERLY WHEN THE TEST WAS ADMINISTERED?

1. The evidentiary testing instrument used to test Wilkinson's breath sample completed a valid simulator solution check at 02:37 hours on October 11, 2009.

2. The valid simulator solution check approved the instrument for evidentiary testing in accordance with ISP Forensic Services SOP.
3. The evidentiary testing instrument functioned properly when the test was administered.

6.

WAS WILKINSON ADVISED OF THE POSSIBLE SUSPENSION OF HER IDAHO DRIVING PRIVILEGE?

1. Wilkinson was played the Idaho Code §§18-8002 and 18-8002A advisory recording prior to submitting to the evidentiary test.
2. Although Wilkinson was interrupted several times when she was being advised of a recording, the DVD reveals an eventual completion of the recording and Officer Davis and Wilkinson reviewing the notice of suspension form prior to Wilkinson submitting to evidentiary testing.
3. Statute and case law only provides a substantial advisement of the notice of suspension form and fails to show a violation occurs when a driver is interrupted during the reading or when the recording of the notice of suspension is being played.
4. Wilkinson was advised of the consequences of refusing or failing evidentiary testing pursuant to Idaho Code §§18-8002 and 18-8002A.

7.

WAS WILKINSON PROPERLY MONITORED PRIOR TO HER BREATH TEST?

1. Wilkinson was monitored prior to her breath test in compliance with ISP Forensic Services SOPs and Idaho Code.
2. It is noted the times in the record for the fifteen-minute observation period do not correspond to each other.
3. However, upon review of the DVD, when Officer Davis and Wilkinson are first observed entering the room up until the time Wilkinson's first subject test, the times shown on the DVD provide fifteen minutes had

elapsed prior to Wilkinson's breath test.

4. Therefore, correlating times from a wristwatch to a breath-testing instrument's clock is an irrelevant issue.
5. ISP Forensic Services SOP Section 3.1 states during *the monitoring period the subject should not be allowed to smoke, drink, eat, or belch/burp*.
6. The SOPs do not mandate the driver should be advised of what is set forth in ISP Forensic Services SOP Section 3.1.
7. Since Officer Davis did not discover any foreign material in Wilkinson's mouth there was no need to restart the fifteen-minute observation period.
8. Case law allows non-certified jail personnel to monitor a driver during the fifteen-minute observation period.
9. Wilkinson failed to submit any proof that the female jailer could not have properly observed Wilkinson and informed Officer Davis of any irregularities occurring when the jailer was patting down Wilkinson.
10. There is an allegation (appears) that Wilkinson had flicked something from her mouth during the observation period but proof by the preponderance of the evidence has not been provided into the record to support this assumption.
11. Wilkinson has provided photos and numerous sequences of times when Officer Davis was not facing Wilkinson during the observation period and the distance where Officer Davis remained during the majority of the observation period.
12. The DVD strongly shows Officer Davis having the capability in using other sensory methods during the observation period that would have detected the possibility of any actions by Wilkinson introducing any foreign matter during the observation period.
13. An opportunity existed at this ALS hearing for Officer Davis to appear by subpoena as permitted by Idaho Code §18-8002A(7).

14. Officer Davis' appearance would clarify, explain, answer questions, and provide input on how he complied with ISP Forensic Services SOPs in monitoring Wilkinson prior to her evidentiary breath test.
15. Even though the subpoena was properly served and a phone number was provided to contact Officer Davis during the ALS hearing, shortly prior to Wilkinson's ALS hearing a request was made in not having Officer Davis appear.
16. Wilkinson attempting to interpret her provided evidence to meet her burden of proof is not sufficient to overcome Officer Davis' standard (boiler point) language provided in Exhibit 3.
17. Furthermore, no local case law has been provided in showing the method used to observe drivers at the Blaine County Jail or Officer Davis violates the fifteen-minute observation period.
18. Upon review of Exhibit 2 Wilkinson's two subject tests differed by 0.014 and were within ISP Forensic Services SOP Sections 3.2 and 3.2.3 requirements.
20. Exhibit 2's BrAC results strongly refute the possibility of an improper fifteen-minute observation period occurred before Wilkinson was administered an evidentiary breath test
21. The record as submitted demonstrates a compliance with ISP Forensic Services SOPs in properly monitoring and observing Wilkinson prior to Wilkinson's evidentiary breath test.

8.

WAS WILKINSON DENIED ACCESS TO AN ATTORNEY?

1. Statute specifically sets forth a driver does not have a right to an attorney prior to any evidentiary testing.
2. The notice of suspension in section 1 had informed Wilkinson of this denial of an attorney prior to evidentiary testing.
3. The DVD also shows Officer Davis explaining to Wilkinson that she does not have a right to an attorney prior to evidentiary testing.

4. Wilkinson has not submitted any proof in showing a request to contact her attorney was made after her evidentiary breath test.
5. Likewise, it reasonable to deduce that Officer Davis or a jailer did offer an opportunity for Wilkinson to call an attorney after Wilkinson's evidentiary breath test.
6. It appears if Wilkinson was able to call a bondsman, Wilkinson had the same chance to call an attorney.
7. Wilkinson failed to meet her burden in showing she was denied access to an attorney after failing an evidentiary breath test.

CONCLUSION OF LAW

CONFLICTING FACTS, IF ANY, WERE CONSIDERED AND REJECTED IN FAVOR OF THE FOREGOING CITED FACTS. BASED UPON THE FOREGOING FINDINGS OF FACT, I CONCLUDE THAT ALL OF THE REQUIREMENTS FOR SUSPENSION OF THE PETITIONER'S DRIVING PRIVILEGES SET FORTH IN IDAHO CODE §§18-8002 AND 18-8002A WERE COMPLIED WITH IN THIS CASE.

THE FOLLOWING ORDER IS RENDERED:

ORDER

THE STAY ORDER IS HEREBY QUASHED AND THE SUSPENSION SET FORTH IN THE NOTICE OF SUSPENSION FOR FAILURE OF EVIDENTIARY TESTING SERVED BY OFFICER DAVIS ON OCTOBER 11, 2009, SHALL BE REINSTATED FOR 90 DAYS COMMENCING ON DECEMBER 28, 2009, AND REMAIN IN EFFECT THROUGH MARCH 28, 2010.

DATED this 17th day of December 2009

A handwritten signature in black ink, appearing to read "Eric G. Moody". The signature is fluid and cursive, with the first name "Eric" and last name "Moody" clearly distinguishable.

Eric G. Moody

ADMINISTRATIVE HEARING EXAMINER

Endnotes

* Idaho's Implied Consent Statute

† Idaho Transportation Department's (ITD hereafter) exhibits are numeric, Petitioner's exhibits are alpha

† Idaho Transportation Department

§ Idaho's Administrative Procedure Act

** Idaho State Police

†† Hereafter SOPs

†† National Highway Transportation Safety Administration

§§ Standardized field sobriety tests

*** Argument and testimony is summarized from record of hearing

††† Issues addressed under Idaho Code §18-8002A(7) will not be repeated under Petitioner's issues

*** Breath Alcohol Concentration

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ISB No. 3150

Attorney for Petitioner

SERVICE COPY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT COURT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

REBECCA S. WILKINSON,)	
	)	Case No. CV-2010-_____
Petitioner,)	
	)	MOTION FOR STAY OF
v.	)	LICENSE SUSPENSION
)	
STATE OF IDAHO, DEPARTMENT)	
OF TRANSPORTATION,)	
)	
Respondent.)	
_____)	

The Petitioner, Rebecca S. Wilkinson, by and through her attorney of record, Brian E. Elkins, moves this Court pursuant to I.R.C.P. 84(m) for an order directing that the Idaho Transportation Department continue the stay that is currently in place on the suspension of the Petitioner's driving privileges that are authorized under Idaho Code § 18-8002A(4)(a)(i). This motion is based upon the fact that the Petitioner has a meritorious claim for overturning the administrative agency's decision which upheld the suspension of the Petitioner's driving privileges even though the prosecutor, in the companion criminal case, conceded and stipulated that the arresting officer did not comply with the requirements of the Standard Operating

Procedures, or the Manual for the Intoxilyzer 5000 by failing to closely monitor and observe the Petitioner 15 minutes prior to the time that she submitted to the breath test. Based on that stipulation, Blaine County Magistrate Judge R. Ted Israel dismissed the companion DUI case.

On two separate occasions the Idaho Transportation Department, while the administrative license suspension case was pending, issued stay orders, staying the suspension of the Petitioner's driving privileges that go into effect by operation of law under Idaho Code § 18-8002A. Attached hereto as Exhibit A is the first "PENDING ACTION" dated November 5, 2009 and the second one, attached hereto as Exhibit B, is dated January 14, 2010 which was issued following the ALS Hearing Officer's Decision sustaining the suspension of the Petitioner's driving privileges.

If a stay is not entered, the Petitioner's driving privileges will become suspended on February 25, 2010, and she will suffer extreme hardship through the loss of driving privileges. Furthermore, Petitioner will suffer irreparable damage if the ALS suspension is imposed as the controversy will most likely become moot after Wilkinson will have completely served her ALS suspension.

This motion is based upon the entire record in this matter and such applicable provisions of the Idaho Administrative Procedures Act and IDAPA, statutes and Rules of Civil Procedure.

Wilkinson agrees that this matter can be set for a hearing in 14 days so that counsel for ITD can be heard on whether a stay should remain in effect.

Oral argument is respectfully requested.

DATED this 18 day of February, 2010.

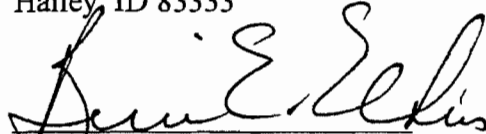

BRIAN E. ELKINS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19 day of February, 2010, I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

☒ Mailed
☐ Hand-Delivered
☐ Faxed to 208-332-7810
☐ Faxed and mailed

Driver Services/ALS Hearing Section
Idaho Transportation Department
P. O. Box 7129
Boise, ID 83707-1129
Hailey, ID 83333


BRIAN E. ELKINS

crim\wilkinson-suspen-stay.mot

**IDAHO TRANSPORTATION DEPARTMENT**

Driver Services • P.O. Box 7129

Boise ID 83707-1129

(208) 334-8735
dmv.idaho.gov

PHONE: (208) 334-8736

WILKINSON, REBECCA SUSAN

NOVEMBER 05, 2009

BOX 4976

LIC/IDENT NO: FA127022G

KETCHUM

ID 83340

FILE NUMBER: 332000025887

DATE OF BIRTH: 11-14-1965

PENDING ACTION

THIS IS TO NOTIFY YOU THAT EFFECTIVE 12:01 A.M. NOVEMBER 05, 2009 ,
THE WITHDRAWAL PERIOD FOR:

ADMIN LIC SUSP BAC .08+/DRUGS/INTOX SUBS I.C. 18-8002A

IS TEMPORARILY STOPPED:

PENDING ADMINISTRATIVE HEARING AND HEARING OFFICERS DECISION

YOUR CLASS D DRIVING PRIVILEGES ARE CLEAR UNLESS OTHERWISE NOTIFIED.
THE ORIGINAL WITHDRAWAL DATES ARE NO LONGER VALID. IN THE EVENT THE
WITHDRAWAL IS RE-ENFORCED, CORRECTED DATES WILL BE ISSUED WITH CREDIT
GIVEN FOR ANY TIME SPENT UNDER WITHDRAWAL.

LICENSE ENCLOSED

COPY

IN THE IDAHO TRANSPORTATION DEPARTMENT

STATE OF IDAHO

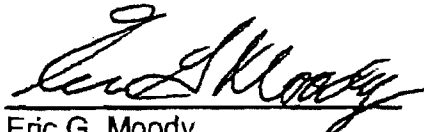
In the Matter of the)
Driving Privileges of)
WILKINSON, REBECCA SUSAN)
_____)

D.L. No. FA127022G
FILE No. 332000025887
STAY
ORDER

Pursuant to Title 67, Idaho Code, and IDAPA rule 04.11.01 the Idaho Transportation Department is hereby ordered to stay WILKINSON, REBECCA SUSAN §18-8002A suspension effective the 5th day of November 2009. The suspension shall be stayed indefinitely pending the written Findings of Fact and Conclusions of Law and Order.

This stay shall not set precedent for stays in future Administrative License Suspension Hearings.

DATED, this 5th day of November 2009.



Eric G. Moody
Hearing Examiner

EXHIBIT A-2 214
154



IDAHO TRANSPORTATION DEPARTMENT

Driver Services • P.O. Box 7129
Boise ID 83707-112918035
(208) 334-8735
dmv.idaho.gov

PHONE: (208) 334-8736

WILKINSON, REBECCA SUSAN

JANUARY 14, 2010

BOX 4976
KETCHUM

ID 83340

LIC/IDENT NO:
FILE NUMBER:
DATE OF BIRTH

PENDING ACTION

THIS IS TO NOTIFY YOU THAT EFFECTIVE 10:04 A.M. JANUARY 14, 2010 ,
THE WITHDRAWAL PERIOD FOR:
ADMIN LIC SUSP BAC .08+/DRUGS/INTOX SUBS I.C. 18-8002A

IS TEMPORARILY STOPPED:

PENDING ADMINISTRATIVE HEARING AND HEARING OFFICERS DECISION

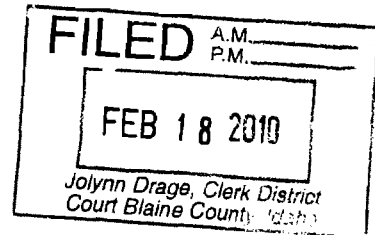
YOUR CLASS D DRIVING PRIVILEGES ARE CLEAR UNLESS OTHERWISE NOTIFIED.
THE ORIGINAL WITHDRAWAL DATES ARE NO LONGER VALID. IN THE EVENT THE
WITHDRAWAL IS RE-ENFORCED, CORRECTED DATES WILL BE ISSUED WITH CREDIT
GIVEN FOR ANY TIME SPENT UNDER WITHDRAWAL.

☐ DICTATION ☐ FILE
☒ COPY ☐ MAILED

TO Bex
ON 1/14/2010 BY BE via fax 726-8383

COPY

EXHIBIT B



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT COURT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

REBECCA S. WILKINSON,

Petitioner,

v.

STATE OF IDAHO, DEPARTMENT
OF TRANSPORTATION,

Respondent.

Case No. CV-2010- 123

ORDER STAYING
LICENSE SUSPENSION

TO: THE IDAHO TRANSPORTATION DEPARTMENT

The Petitioner's Motion for Order Staying License Suspension came before this Court on the 18 day of February, 2010 with the Petitioner being represented by her attorney of record, Brian E. Elkins. Based upon the record in this matter and the fact that a Petition for Judicial Review was filed concurrently with the Petitioner's request for the entry of an order staying the suspension of her driving privileges, pursuant to Idaho Code § 67-5274 and Rule 83(m) of the Idaho Rules of Civil Procedure, to maintain the status quo and good cause otherwise appearing since there were stay orders previously entered by the Idaho Transportation Department - ALS Hearing Section,

The Idaho Transportation Department IS HEREBY ORDERED TO STAY Rebecca Susan Wilkinson's I. C. § 18-8002A driver's license suspension effective immediately until further order of the Court. The Petitioner's Driver's License Number is [REDACTED] and the ITD File Number is 332000025887.

ORDER STAYING LICENSE SUSPENSION

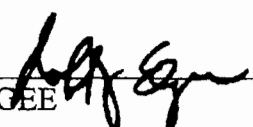
ITD REC'D FEB 22 2010

- 1

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166

This matter shall be set for a hearing on 3/15, 2010, at 9:30 a.m. to provide counsel for the Idaho Transportation Department an opportunity to be heard on whether the stay remains in effect.

DATED this 18 day of February, 2010.



ROBERT J. ELGEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19 day of February, 2010, I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

☒ Mailed
☐ Hand-Delivered
☐ Faxed to 208-332-7810
☐ Faxed and mailed

Driver Services/ALS Hearing Section
Idaho Transportation Department
P. O. Box 7129
Boise, ID 83707-1129
Hailey, ID 83333

☐ Mailed
☒ Hand-Delivered
☐ Faxed to Fax Number

Brian E. Elkins
Attorney at Law
P. O. Box 766
Ketchum, ID 83340



CLERK OF THE COURT

crim\wilkinson-suspen-stay.ord

ORDER STAYING LICENSE SUSPENSION

NOT REC'D FEB 22 2010

- 2

219
157



IDAHO TRANSPORTATION DEPARTMENT

Driver Services • P.O. Box 7129
Boise ID 83707-1129

10014
(208) 334-8735
dmv.idaho.gov

PHONE: (208) 334-8736

WILKINSON, REBECCA SUSAN

FEBRUARY 22, 2010

BOX 4976
KETCHUM

ID 83340

LIC/IDENT NO:
FILE NUMBER:
DATE OF BIRTH:

PENDING ACTION

THIS IS TO NOTIFY YOU THAT EFFECTIVE 12:01 A.M. FEBRUARY 18, 2010 ,
THE WITHDRAWAL PERIOD FOR:
ADMIN LIC SUSP BAC .08+/DRUGS/INTOX SUBS I.C. 18-8002A

IS TEMPORARILY STOPPED:
PENDING JUDICIAL REVIEW

YOUR CLASS D DRIVING PRIVILEGES ARE CLEAR UNLESS OTHERWISE NOTIFIED.
THE ORIGINAL WITHDRAWAL DATES ARE NO LONGER VALID. IN THE EVENT THE
WITHDRAWAL IS RE-ENFORCED, CORRECTED DATES WILL BE ISSUED WITH CREDIT
GIVEN FOR ANY TIME SPENT UNDER WITHDRAWAL.

COPY



IDAHO TRANSPORTATION DEPARTMENT

Driver Services • P.O. Box 7129
Boise ID 83707-1129

(208) 334-8735
dmv.idaho.gov

Date: February 22, 2010

Wally Hedrick
Hedrick Court Reporting
PO Box 578
Boise, Idaho 83701

Re: Rebecca Susan Wilkinson, A.L.S. File #332000025887
Administrative License Suspension, Date of Hearing: December 1, 2009 &
January 26, 2010

Dear Mr. Hedrick

Please find enclosed the 2 hearing recordings of the administrative hearings as referenced above. The first hearing is approximately 7 minutes long (December 1, 2009) and the second hearing is approximately 11 minutes long (January 26, 2010). Please prepare an estimate of the transcription cost, and submit the estimate to the State's assigned attorney. Please send a copy of the estimate to my attention as well. The attorney representing the State in this case is:

Timothy Stover
Attorney at Law
PO Box 5226
Twin Falls ID 83303-5226
208-736-9900

If the transcript cannot be completed within 14 days of the receipt of the estimated cost, please notify the State's attorney. Upon completion of the transcript send the original and two copies to the State's attorney for filing with the court along with the administrative record. The final billing, of course, should go to the State's attorney. If you have any questions, please contact me at (208) 334-4465.

Sincerely,

Hal Putnam,
Driver Records Program Supervisor
Driver Services
enc: cd recordings(2) for Rebecca Susan Wilkinson

COPY

COPY



March 2, 2010

TIMOTHY STOVER, ESQ.
Attorney at Law
P.O. Box 5226
Twin Falls, ID 83303-5226

RE: Rebecca Susan Wilkinson, A.L.S. File #332000025887
A.L.S., Date of Hearing: December 1, 2009 & January 26, 2010

Dear Mr. Stover:

Per the request of the Supervisor of Driver Records,
Hal Putnam, we are hereby providing you with an
estimate of the transcription costs in the above
entitled matter.

Cost of preparing an original plus two copies from the
cassette tape provided by the state, with an estimated
length of 11 minutes is:


\$90.00

Delivery time is 10 working days from the date that we
receive written authority to proceed from Petitioner's
legal counsel. Petitioner's payment must be received
prior to delivery of the transcript.

Thank you.

Sincerely,

HEDRICK COURT REPORTING


Jerrie S. Hedrick
ICSR #61

cc: Hal Putnam

Serving the legal community since 1978

POST OFFICE BOX 578
BOISE, IDAHO 83701
208-336-9208

222

150

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

Rebecca S. Wilkinson,

Petitioner,

vs.

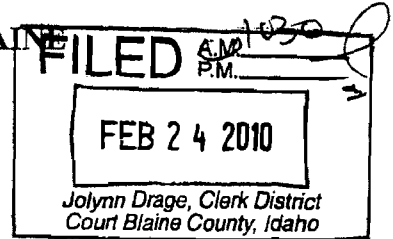
State of Idaho Dep. Of Transportation,

Respondent.

)
)
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Case No. CV2010-0000123

**PROCEDURAL ORDER GOVERNING
JUDICIAL REVIEW OF AGENCY
ACTION BY DISTRICT COURT**



A Petition for Judicial Review has been filed in the above-entitled District Court seeking judicial review of state agency and local government actions. This Order, together with Rule 84, *Idaho Rules of Civil Procedure*, (*I.R.C.P.*) and the applicable statutes shall govern all proceedings before this Court.

1. Petition for Judicial Review or Cross-Petitions for Judicial Review; Filing Fees: The petitioner's Petition for Judicial Review was filed February 18, 2010. A Cross-Petition for Judicial Review [has not been filed.] If not already paid, all judicial review filing fees, if any, must be paid within seven (7) days after filing of the Petition for Judicial Review or Cross-Petition for Judicial Review. Failure to timely pay any filing fee shall be grounds for dismissal without further notice.

2. Stays: Unless provided by Statute, the filing of a Petition or Cross-Petition does not automatically stay the proceedings and enforcement of the action of an agency that is subject to the Petition. Any application or Motion for Stay must be made in accordance with *I.R.C.P.* Rule 84(m).

3. Form of Review: Pursuant to *I.R.C.P.* 84(e)(1), when judicial review is authorized by statute, judicial review shall be based upon the record created before the agency rather than as a trial de novo, unless the statute or law provides for the procedure or standard. If the authorized statute provides the district court may take additional evidence upon judicial review, it may order the same on its own motion or the motion of any party. If the statute provides that review is de novo, the appeal shall be tried in the district court on any and all issues, on a new record. Pursuant to *I.R.C.P.* Rule 84(e)(2), the scope of review on petition from an agency to the district court shall be as provided by statute.

4. Preparation of Agency Record; Payment of Fees: Pursuant to *I.R.C.P.* 84(f), when the statute provides what shall be contained in the official record of the agency upon judicial review, the agency shall prepare the record as provided by statute.

Otherwise, the documents listed in paragraph (3) of *I.R.C.P.* Rule 84(f) shall constitute the agency record for review. Petitioner shall pay all fees as required for preparation of the agency record in accordance with *I.R.C.P.* Rule 84(e)(4). The clerk of the agency in accordance with *I.R.C.P.* Rule 84(e)(5) shall lodge the record with the agency within 14 days of the filing of the Petition for Judicial Review. Any extension sought for preparation of the agency record shall be made by the agency to the district court.

5. Preparation of Transcript, Payment of Fee: The Court requires the provision of a written transcript prepared from the recorded or reported proceedings. It is the responsibility of the Petitioner (or Cross-Petitioner, as the case may be) to timely arrange and pay for preparation of all portions of the transcript reasonably necessary for review. Pursuant to *I.R.C.P.* 84(g), the responsible party shall contact the agency clerk to determine the estimated cost of the transcript, and pay the estimated cost in accordance with *I.R.C.P.* 84(g)(1)(A) or (2)(A) as the case may be. The transcript shall be lodged with the agency within 14 days of the filing of the petition for judicial review in accordance with *I.R.C.P.* 84(g)(1)(B), (C) or 84(g)(2)(B)(C) as the case may be. The transcriber may apply to the district court for an extension of time, for good cause shown.

6. Settlement of Transcript and Record. Pursuant to *I.R.C.P.* 84(j), and unless otherwise provided by statute, upon receipt of the transcript and upon completion of the record, the agency shall mail or deliver Notice of Lodging of Transcript and Record to all attorneys of record or parties appearing in person and to the district court. The parties shall have 14 days from the date of mailing of the notice to pick up a copy of the transcript and agency record and to object to the transcript or record. All fees for the preparation of the transcript and record shall be paid by the responsible party at or before the pick up of the agency record and transcript. Any objection to the record shall be determined by the agency within 14 days of receipt of the objection and the agency decision on the objection shall be included in the record on petition for review. Upon the failure of the party to object within 14 days, the transcript and record shall be deemed settled. Pursuant to *I.R.C.P.* 84(k), the settled record and transcript shall be lodged with the district court within 42 days of the service of the Petition for Judicial Review.

7. Augmentation of Record- Additional Evidence Presented to District Court- Remand to Agency to Take Additional Evidence: Pursuant to *I.R.C.P.* 84(l) the agency record and/or transcript on review may be augmented upon motion by a party within 21 days of the filing of the settled transcript and record in the manner prescribed by *I.A.R.* 30. The taking of additional evidence by the district court and/or agency on remand shall be governed by statute or *I.R.C.P.* 84(l).

8. Briefs: The petitioner's brief shall be filed with the clerk within 35 days after lodging of the transcript and record. The respondent's brief (cross-petitioner's brief) shall be filed within 28 days after service of petitioner's brief. The petitioner may file a reply brief within 21 days after service of respondent's brief. The organization and content of briefs shall be governed by *I.A.R.* 35 and 36. Pursuant to *I.R.C.P.* 84(p) only one (1) original signed brief may be filed with the court; however, an additional copy of any brief will be plainly marked "Judge's copy" and will be provided for use by the

court, mailed or delivered to the judge in chambers. Copies of all briefs shall be served on all parties.

9. **Extensions of Time:** Motions to extend the time for filing a brief shall be submitted in conformity with *I.A.R.* 34(e). All other requests for extension of time shall be submitted in conformity with *I.A.R.* 46.

10. **Motions:** All motions shall be submitted in conformity with *I.R.C.P.* 84(o) and shall be heard with out oral argument unless ordered by the Court.

11. **Oral Argument:** After all briefs have been filed, either party may set the matter for oral argument pursuant to *I.R.C.P.* 84(q). If neither party notices the matter for oral argument within 14 days of the filing of the last brief (or the time for filing briefs has expired) the Court will deem oral argument waived and the matter will be decided on the record, transcript and briefs. If the matter is set for oral argument, the form and order of argument shall be governed by *I.A.R.* 37. *If neither party sets the matter for hearing, it is the responsibility of both counsel to advise the court the matter is submitted for decision.*

12. **Judgment or Decision.** The Court's decision will be by written memorandum which shall constitute the Judgment or Decision required by *I.R.C.P.* 84(t)(1). *lye*

13. **Attorneys Fees and Costs on Appeal:** Costs and attorneys fees on judicial review shall be claimed, objected to and fixed in accordance with *I.A.R.* 40 and 41, provided that only one original signed claim, objection or supporting or opposing affidavit need be filed.

14. **Remittitur:** If no notice of appeal to the Idaho Supreme Court is filed within forty-two (42) days after filing of the Court's written decision, the clerk shall issue a *remittitur* remanding the matter to the agency as provided in *I.R.C.P.* 84(t)(4).

15. **Failure to Comply:** Failure by either party to timely comply with the requirement of this Order or provisions of the *Idaho Rules of Civil Procedure* or *Idaho Appellate Rules*, if applicable, shall be grounds for imposition of sanctions, including, but not limited to the allowance of attorneys fees, striking of briefs or dismissal of the appeal pursuant to *I.R.C.P.* 11 and 84(n) and *I.A.R.* 11.1 and 21.

DATED this 23 day of Feb may, 2010.

Holly Egan

District Judge

CERTIFICATE OF SERVICE

I, undersigned, hereby certify that on the 24 day of February, 20 , I caused to be served a true and correct copy of the foregoing, by the method indicated below, and addressed to the following:

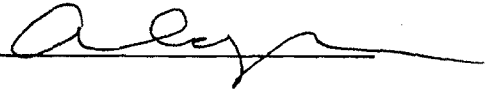
Brian E. Elkins
PO Box 766
Ketchum, ID 83340

☒ U.S. Mail
☐ Hand delivered
☐ Faxed
☐ Court Folder

Driver Services/ ALS Hearing Section
Idaho Transportation Department
PO Box 7129
Boise, ID 83707-1129

☒ U.S. Mail
☐ Hand delivered
☐ Faxed
☐ Court Folder

CLERK OF THE COURT

By: 

BRIAN F. ELKINS
ATTORNEY AT LAW
A PROFESSIONAL CORPORATION

1000 PROFFER SQUARE PROFESSIONAL BUILDING
208 SOUTH AVENUE NORTH
P.O. BOX 766
KETCHUM, IDAHO 83340

TEL: 208/726-4338
FACSIMILE: 208/726-9328
E-MAIL: bcelkins@cox.net

March 2, 2010

Via Facsimile: 1-208-332-2002

Elise Rising
Administrative Assistant, Driver Services
Idaho Transportation Department
P. O. Box 7129
Boise, ID 83701-1129

Re: *Rebecca Susan Wilkinson v. State of Idaho, Department of Transportation*
Blaine County Case No. CV-10-123

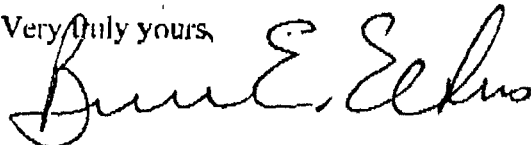
Dear Ms. Rising:

As I was preparing to file the Petition for Judicial Review I spoke to Callie at the ALS Hearing Section and she advised that the transcript of the various hearings held in the above referenced matter would be forwarded to Hedrick Reporting and that an estimate of the cost would be forwarded to me.

So that I comply with the District Court's Procedural Order Governing Judicial Review of Agency Action by District Court filed February 24, 2010, it provides in paragraph 5 that I am to arrange and pay for the preparation of the transcript. The order provides that I am to contact the agency clerk to determine the estimated cost of the transcript and provide payment. This may already be in progress but I wanted to send written notice requesting the estimated cost of the transcript. Once that is determined, please forward it to my office and I will timely pay the cost.

Thank you for your assistance in this matter.

Very truly yours,

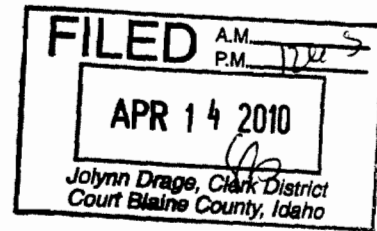


Brian F. Elkins

BTB:cc

pc: Tim Stover
Rebecca Wilkinson

BRIAN E. ELKINS, P.C.
 Attorney at Law
 208 Spruce Avenue North
 P. O. Box 766
 Ketchum, Idaho 83340
 Telephone (208) 726-4338
 Facsimile (208) 726-9328
 E-mail: beelkins@cox.net
 ISB No. 3150



Attorney for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT COURT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

REBECCA S. WILKINSON,)	
	)	Case No. CV-10-123
Petitioner,)	
v.	)	MOTION TO CORRECT
	)	AGENCY RECORD
STATE OF IDAHO, DEPARTMENT)	
OF TRANSPORTATION,)	
)	
Respondent.)	

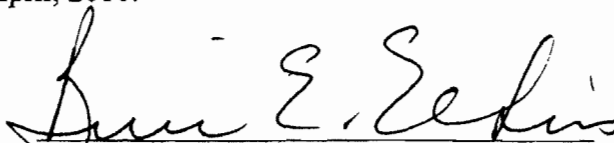
Petitioner, Rebecca S. Wilkinson ("Wilkinson"), by and through her attorney, Brian E. Elkins, moves this Court pursuant to her initial Response to Notice of Lodging of Agency Record to request that the following pages be redacted from the record: R., pp. 69, 71, and 73.

For reasons that are not entirely clear to counsel for Wilkinson, these pages are from another brief, on a completely different case, which found their way into the Petitioner's Written Argument in Support of Vacating Suspension contained in R., pp. 68-82. All that counsel for Wilkinson can offer as an explanation is that at the time the document was printed, office staff was recycling paper that had Green's Appellant's Brief on the back side of the pages.

This motion is based upon the entire record in this matter and an effort to make the agency record clear.

Oral argument is not requested unless deemed necessary by the Court or the motion is objected to by the Respondent.

DATED this 13 day of April, 2010.

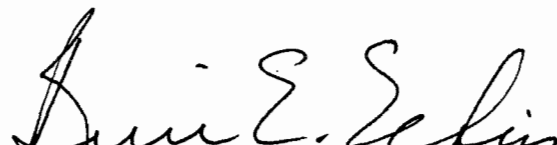

BRIAN E. ELKINS

CERTIFICATE OF SERVICE

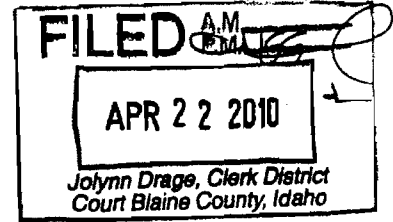
I HEREBY CERTIFY that on the 13 day of April, 2010 I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

☒ Mailed
☐ Hand-Delivered
☐ Faxed to 208-736-9929
☐ Faxed and mailed

Timothy J. Stover
Special Deputy Attorney General
Idaho Transportation Department
P. O. Box 5226
Twin Falls, ID 83303-5226


BRIAN E. ELKINS

crim\wilkinson-CorrectRecord.mot



BRIAN E. ELKINS, P.C.
Attorney at Law
208 Spruce Avenue North
P. O. Box 766
Ketchum, Idaho 83340
Telephone (208) 726-4338
Facsimile (208) 726-9328
E-mail: beelkins@cox.net
ISB No. 3150

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT COURT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

ORIGINAL IN RED

REBECCA S. WILKINSON,)	
	)	Case No. CV-10-123
Petitioner,)	
v.	)	ORDER CORRECTING
	)	AGENCY RECORD
STATE OF IDAHO, DEPARTMENT)	
OF TRANSPORTATION,)	
)	
Respondent.)	
_____)	

The Petitioner, Rebecca S. Wilkinson ("Wilkinson"), filed a Motion to Edit Agency Record requesting that R., pp. 69, 71, and 73 be redacted since there are evidently pages from an unrelated matter that were copied by ITD from the back side on three of the pages of the Petitioner's Written Argument in Support of Vacating Suspension. See R., pp. 68 - 82.

There being no objection from the Respondent and good cause otherwise appearing therefor;

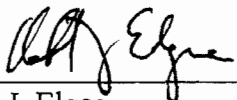
IT IS HEREBY ORDERED that pages 69, 71 and 73 shall be redacted and stricken from the Agency Record.

ORDER CORRECTING AGENCY RECORD

- 1

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DATED this 28 day of April, 2010.



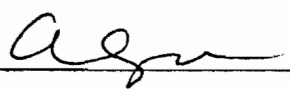
Robert J. Elgee
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22 day of April, 2010 I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

<input checked="" type="checkbox"/> Mailed	Timothy J. Stover
<input type="checkbox"/> Hand-Delivered	Special Deputy Attorney General
<input type="checkbox"/> Faxed to 208-736-9929	Idaho Transportation Department
<input type="checkbox"/> Faxed and mailed	P. O. Box 5226
	Twin Falls, ID 83303-5226

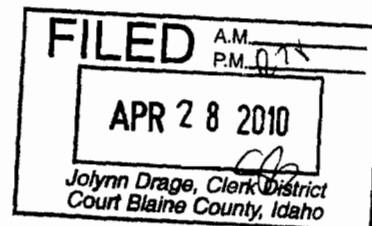
<input checked="" type="checkbox"/> Mailed	Brian E. Elkins
<input type="checkbox"/> Hand-Delivered	Attorney at Law
<input type="checkbox"/> Faxed to 726-9328	P. O. Box 766
<input type="checkbox"/> Faxed and mailed	Ketchum, ID 83340



Clerk of the Court

crim\wilkinson-editrecord.ord

BRIAN E. ELKINS, P.C.
 Attorney at Law
 208 Spruce Avenue North
 P. O. Box 766
 Ketchum, Idaho 83340
 Telephone (208) 726-4338
 Facsimile (208) 726-9328
 E-mail: beelkins@cox.net
 ISB No. 3150



Attorney for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT COURT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

REBECCA S. WILKINSON,)	
	)	Case No. CV-10-123
Petitioner,)	
	)	PETITIONER'S BRIEF
)	
STATE OF IDAHO, DEPARTMENT)	
OF TRANSPORTATION,)	
)	
Respondent.)	
_____)	

I. INTRODUCTION

The above named Petitioner, Rebecca Susan Wilkinson ("Wilkinson"), through her attorney, Brian E. Elkins, submits the following brief in support of her Petition for Judicial Review. Wilkinson filed her Petition for Judicial Review on February 18, 2010 seeking, *inter alia*, an order from this District Court setting aside and vacating (reversing) the Amended Findings of Fact and Conclusions of Law and Order entered by an Administrative License Suspension (ALS) Hearing Examiner for the Idaho Transportation Department (ITD), dated

February 11, 2010.¹ *See*, Petition for Judicial Review, p. 6, para. 3.²

II. PROCEDURAL HISTORY AND FACTS

These legal proceedings were initiated on October 11, 2009, when Hailey police officer Garth Davis stopped a motor vehicle that was being driving by Wilkinson. Officer Davis stopped Wilkinson's vehicle after developing sufficient legal cause to make a vehicle stop.³ A short time after making contact with Wilkinson, she was arrested for driving while under the influence of alcohol in violation of Idaho Code § 18-8004 (DUI). Wilkinson was taken into custody and transported a short distance from North Main Street in Hailey to the Blaine County Public Safety Building (BCPSB) located in South Hailey.

At the BCPSB Wilkinson was escorted by Officer Davis into a room which, for the sake of convenience, counsel for Wilkinson will refer to as the "Intox room." Based on Idaho law, and Idaho's implied consent statute, I.C. § 18-8002, Officer Davis requested that Wilkinson submit to a breath test to determine alcohol concentration through an Intoxilyzer 5000EN, serial number 68-013466, (Intox machine) in the Intox room. According to the "printer card" for the Intox machine,⁴ Wilkinson allegedly failed the evidentiary test for having a blood alcohol concentration (BAC) in excess of the legal limit which prompted Officer Davis to serve on Wilkinson the Notice of Suspension for Failure of Evidentiary Testing (advisory for Sections 18-8002 and 18-8002A, Idaho Code) (hereinafter referred to as the NOS Form)⁵ whereupon Wilkinson's license was seized and she was served with the NOS Form pursuant to the requirements of Idaho Code § 18-8002A (ALS statute). Under the ALS statute, Wilkinson timely requested an ALS hearing pursuant to I.C. §18-8002A(7) before ITD and presented various

¹*See*, Agency Record (hereinafter referred to as "R"), pp. 125-139.

²*See, also*, R., p. 145.

³*See*, Officer Davis' Probable Cause Affidavit in Support of Arrest, R., pp. 4-6.

⁴*See*, R., p. 3

⁵*See*, R., p. 1.

issues that could be raised at an ALS hearing.⁶

Once a request is made for an ALS hearing, the ALS statute requires that the hearing be held within 20 days of the request for hearing.⁷ Wilkinson's ALS hearing was initially set for November 3, 2009 at 9:00 a.m. before ALS Hearing Officer Eric Moody.⁸ However, Officer Davis was not able to appear for the hearing set for that day⁹ and it was reset for December 1, 2009 at 2:00 p.m.¹⁰

By operation of law, under the ALS statute, an ALS suspension goes into effect 30 days following the service of the NOS Form. *See*, I. C. § 18-8002A(4)(b). Since Officer Davis was unable to appear at the ALS hearing, the ALS Hearing Officer agreed to enter an order staying the ALS suspension "indefinitely pending the written findings of fact and conclusions of law and order."¹¹

The ALS hearing was reset for December 1, 2009 and additional exhibits were offered by Wilkinson, most notably a CD which contained a digital recording of the events that transpired in the Intox room prior to the time that Wilkinson submitted to the breath test on the Intox machine. *See*, Petitioner's Exhibit M. As will be discussed in greater detail, it is Wilkinson's view that Officer Davis did not properly "monitor" and "observe" her during the 15 minutes prior to the breath test (BrAC), as required by the manual and standard operating procedures for the Intox

⁶*See*, R., pp. 10-13. *See, also*, the ALS statute which sets forth the statutory basis for allowing the suspension of driving privileges for 90 days for a first failure of evidentiary testing, who carries the burden of proof, and the issues that can be raised at the ALS hearing.

⁷*See*, ALS statute, I. C. § 18-8002A(7), which reads in pertinent part, "If a hearing is requested, the hearing shall be held within twenty (20) days of the date the hearing request was received by the department unless this period is, for good cause shown, extended by the hearing officer for one ten (10) day period. Such extension shall not operate as a stay of the suspension and any temporary permit shall expire thirty (30) days after service of the notice of suspension"

⁸*See*, R., p. 99.

⁹*See*, R., p. 105.

¹⁰*See*, R., p. 112.

¹¹*See*, R., p. 25.

machine.

At the ALS hearing, Wilkinson also requested that the hearing officer leave the record open for 15 days to allow Wilkinson sufficient time to supplement the record and also submit a written closing argument in support of an order vacating the ALS suspension.¹²

Based upon the content of Petitioner's Exhibit M, the CD, counsel for Wilkinson decided not to call Officer Davis as a witness to testify at the ALS hearing. In an order dated December 17, 2009, the ALS Hearing Officer issued his Findings of Fact and Conclusions of Law and Order sustaining the ALS suspension (the first ALS Decision).¹³ On December 31, 2009, pursuant to the Idaho Administrative Procedures Act (IDAPA) 39.02.72.600, Wilkinson timely filed a Request for Reconsideration requesting the ALS Hearing Officer to reconsider his first ALS Decision and also allow the opportunity to further supplement the record and to call Officer Davis as a witness.¹⁴ Also, since Wilkinson's driving privileges were going to become suspended on December 28, 2009 under the first ALS Decision,¹⁵ Wilkinson filed a Motion for Stay of Suspension of Driving Privileges on January 12, 2010,¹⁶ which was granted by the ALS hearing officer on January 14, 2010.¹⁷ In response to Wilkinson's Request for Reconsideration, ITD set the matter for another telephone hearing for January 26, 2010 at 3:00 p.m. before ALS Hearing Officer Eric Moody.¹⁸

On January 8, 2010 Wilkinson filed her supplement to the Request for Reconsideration and offered into the record a Stipulation to Suppress BrAC Results and State's Motion to

¹²See, R., p. 118.

¹³See, R., pp. 35-47.

¹⁴See, R., pp. 84-86.

¹⁵See, R., p. 43.

¹⁶See, R., pp. 96-98.

¹⁷See, R., p. 165.

¹⁸See, R., p. 121.

Dismiss which was filed in the companion criminal case.¹⁹ There, Wilkinson's breath test results were suppressed from evidence "for failure of the arresting officer, Garth Davis of the Hailey Police Department, to observe and monitor the Defendant [Wilkinson] the requisite 15 minutes before she submitted to the breath test."²⁰ The companion criminal DUI case was dismissed and in an order filed by Blaine County Magistrate Judge, R. Ted Israel dated January 7, 2010, the Order of Dismissal provided, *inter alia*, that the arresting officer failed "to properly observe and monitor the Defendant for 15 minutes prior to the time that she submitted to the breath test."²¹

At the hearing on Wilkinson's Motion to Reconsider on January 26, 2010, Officer Davis testified before ALS Hearing Officer Eric Moody and agreed that he did not satisfy the requirements of the observation period because: "What hadn't been satisfied was the fact that I had my back turned to her [Wilkinson] multiple times."²² Officer Davis also agreed that he failed to "monitor her closely during the 15-minute observation period" prior to the time that Wilkinson submitted to the breath test.²³ It should not be missed that Officer Davis is required to be certified by the Idaho State Police to run a BrAC test on the Intox machine.²⁴

Notwithstanding the testimony of Officer Davis and the other exhibits and arguments submitted to the hearing officer, on February 11, 2010, Eric Moody rendered the "Amended Findings of Fact and Conclusions of Law and Order" (the second ALS Decision) sustaining the ALS suspension to be imposed on Wilkinson.²⁵

Wilkinson timely filed her Petition for Judicial Review pursuant to I. C. § 18-8002A(8)

¹⁹See, R., pp. 87-94.

²⁰See, R., p. 91.

²¹See, R., p. 93.

²²See, Transcript of ALS Hearing held January 26, 2010 (hereinafter referred to as Tr., 1/26/2010) p. 5, Ls. 15-17.

²³*Id.*, p. 6, Ls. 1-5.

²⁴See, Davis' PC Affidavit, R., p. 5 and ISP Standard Operating Procedure - Breath Alcohol Testing (Rev. 7/7/2009), Section 3.1.2, p. 6.

²⁵See, R., pp. 125-136.

and § 67-5270, *et seq.* and I.R.C.P. 84 to bring the matter before this Court. IDAPA governs the review of ITD decisions to deny, cancel, suspend, disqualify, revoke, or restrict a person's driver's license. *See* I.C. §49-201, 49-330, 67-5201(2), 67-5270; *see also, Bennett v. State, Dept. of Transp.* 147 Idaho 141, 206 P.3d 505 (Ct.App. 2009); *Wheeler v. ITD*, 148 Idaho 378, 223 P.3d 761.

III. ISSUES ON JUDICIAL REVIEW

Based upon I.C. §67-5279(3), in the Second ALS Decision:

- A. Did the Hearing Officer violate statutory or constitutional provisions?
- B. Did the Hearing Officer exceed the agency's statutory authority?
- C. Did the Hearing Officer render findings that were made upon unlawful procedure?
- D. Did the Hearing Officer render findings that were not supported by substantial evidence in the record?
- E. Were the Hearing Officer's findings arbitrary, capricious, or an abuse of discretion?

IV. STANDARD OF JUDICIAL REVIEW

I.R.C.P. 84(e)(2) provides that the scope of judicial review on petition from an agency to the district court shall be as provided by statute. That statute, I. C. § 67-5279, was recently reviewed by the Idaho Court of Appeals *In Re Schroeder*, 147 Idaho 476, 210 P.3d 584 (Ct. App. 2009), where Chief Judge Lansing noted:

Upon judicial review, a hearing officer's decision must be affirmed unless the court determines that the hearing officer's findings, inferences, conclusions or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I. C. § 67-5279(3). The reviewing court may not substitute its judgment for that of the hearing officer as to the weight of the evidence on questions of fact. I. C. § 67-5279(1). In an appeal from a district court's decision where the district court was acting in its appellate capacity over the agency, this Court will review the agency record independently of the district court's decision.

147 Idaho at 478.

A court should defer to the agency's findings of fact unless they are clearly erroneous. *Bennett v. State, Dept. of Transp.*, 147 Idaho 141, 206 P.2d 505 (Ct. App. 2009). When this Court compares the record to the ALS hearing officer's first and second ALS Decisions, Wilkinson submits that they are indeed clearly erroneous and the Order must be vacated: even the Officer Davis, who has been trained on how to administer a BrAC test, agrees that he failed to comply with the procedures and regulations. Officer Davis' actions are also displayed, in living color, on the CD recording from the Intox room (Petitioner's Exhibit M) and it is so obvious that he did not properly observe Wilkinson, even the prosecutor stipulated to the fact and the DUI case was dismissed.

V. THE RELEVANT ISSUE BEFORE THE ALS HEARING OFFICER

Under the ALS statute, the ALS hearing officer is required to uphold the ALS suspension unless the officer finds, by a preponderance of the evidence, that the driver/petitioner has shown one of the several grounds enumerated in I. C. § 18-8002A(7) for vacating the suspension. One of these grounds include a finding that the alcohol concentration test was not conducted by a method that has been approved by the ISP pursuant to I. C. § 18-8004(4). *See* I.C. 18-8002A(7)(d). The ISP has been given the responsibility to promulgate regulations for administration of breath alcohol tests through I. C. §§ 18-8002A(3), 18-8004(4) and IDAPA 11.03.01.013.03. The ISP has attempted to carry out that responsibility through the creation of standard operating procedures and training manuals for the use of breath test instruments and, in particular with respect to this case, the Intoxilyzer 5000EN.

The Intoxilyzer 5000 - Operator's Training Manual (March 2007) (hereinafter referred to as the Manual) contains a section on page 8 devoted to the "15-minute waiting period (15 MWP)." Attached hereto as Exhibit A are the relevant pages out of the Manual. Here is the pertinent passage from the Manual with respect to the 15 MWP:

The mucus lining of the mouth cavity and nasal passages stores alcohol for some time after a person consumes alcohol. Normal body processes eliminate residual mouth alcohol within 15 minutes.

Monitor the subject for 15 minutes. During this time, the subject may not smoke, consume alcohol, eat, belch, vomit, use chewing tobacco, or have gum or candy in the mouth. If belching or vomiting does occur or something is found in the mouth, have it removed and wait an

additional 15 minutes.

OPERATING PROCEDURE FOR A BREATH TEST:

Observe subject for 15 minutes.

The subject should not drink, smoke or use **any** type of oral medication during this time.

....

(Emphasis in bold in original, and emphasis in italics added.)

Exhibit A-2, Manual, p. 8.

The ISP, Standard Operating Procedure - Breath Alcohol Testing (Revised 7/7/2009) (SOP) also governs BrAC tests on the Intox machine and the relevant pages from the SOP are attached hereto as Exhibits B. In paragraph 3.1, SOP, p. 6 (Exhibit B-2), it reads:

Prior to evidential breath alcohol testing the subject *must* be **monitored for fifteen (15) minutes**. . . .

...

3.1.4 The operator may elect a blood test in place of the breath alcohol test if there is a failure to complete the fifteen minute monitoring period successfully.

3.1.5 During the monitoring period, the operator *must be alert* for any event that might influence the accuracy of the test.

3.1.5.1 The operator *must be aware* of the possible presence of mouth alcohol as indicated by the testing instrument . . .

3.1.5.2 If, during the 15 minute waiting period, the subject vomits or is otherwise suspected of regurgitating material from the stomach, the 15 minute waiting period *must* begin again.

(Emphasis in bold in original; emphasis added in italics.)

For additional insight on the requirements of observing and monitoring a suspect during the 15 MWP, the SOP contains a provision for the situation where the first two breath samples differ by more than .02 where it reads:

3.2.3.1 Unless mouth alcohol is indicated or suspected, it is **not** necessary to repeat the 15-minute waiting period to obtain a third breath sample.

See, SOP, pp. 6 and 7.

In summary, as it can be seen from these passages out of the Manual and SOP, one of *the* most important requirements of the operating procedures for a BrAC test, is for the police officer to closely monitor and watch the driver 15 minutes prior to the test. Because if that person burps, or regurgitates fluid from her stomach, then we have a tainted BrAC test that degrades the entire prosecution for the serious charge of DUI.

Accordingly, as can be seen from the information provided thus far, the primary issue before the ALS hearing officer is whether Officer Davis properly observed and monitored Wilkinson during the 15 MPW and Wilkinson contends that, as we found in the companion criminal case, and a review of the CD, that it was evident that it was not. To be clear, this issue does not question whether Officer Davis was with Wilkinson for the requisite 15 minutes prior to the time that she submitted to the first breath test: It is clear that Officer Davis was in the same room with Wilkinson for 15 minutes but, rather, the issue is whether he properly monitored her and observed her sufficiently so that he could be “alert” for any event that might affect the integrity of the breath test.

VI. ARGUMENT

A. THE ISSUE IS RES JUDICATA OR BARRED BY COLLATERAL ESTOPPEL

In the first ALS Decision,²⁶ the ALS Hearing Officer, while sustaining the ALS suspension, that:

17. Furthermore, no local case law has been provided in showing the method used to observe drivers at the Blaine County jail or Officer Davis violates the 15-minute observation period.²⁷

In her Request for Reconsideration, in paragraph 3, *inter alia*, Wilkinson indicated:

Also, in paragraph 17, page 8 of the Findings of Fact and Conclusions of Law and Order, the ALS hearing officer points to the lack of “local case law” to show that the method used for observing drivers at the Blaine County jail violates the 15-minute observation period. The petitioner will be having an evidentiary hearing in the companion criminal case on January 7, 2010 and once the results of that hearing are decided by Blaine County Magistrate R.

²⁶See, Findings of Fact and Conclusions of Law and Order dated December 17, 2009, R., pp. 35-44.

²⁷*Id.*, R., p. 42.

Ted Israel, the Petitioner requests an opportunity to submit that information to the ALS hearing officer assigned to this case.

See, R., p. 85.

Indeed, after the evidentiary hearing that was scheduled for January 7, 2010, Wilkinson filed a Supplement to Petitioner's Request for Consideration which included a stipulation to suppress the breath test results and an order of dismissal.²⁸

As contained in the Order of Dismissal, *R.*, p. 93, Blaine County Magistrate Judge held:

IT IS HEREBY ORDERED that the Defendant's breath tests results for alcohol concentration be suppressed from evidence for failure of the arresting officer/operator of the Intoxilyzer 5000 breath testing machine, to properly observe and monitor the Defendant for 15 minutes prior to the time that she submitted to the breath test.

Whereupon the State moved to dismiss the citation, no. 25887, which charged the Defendant with driving while under the influence of alcohol, in violation of Idaho Code § 18-8004 filed in this matter; and there being no objection from the Defendant, this case shall be DISMISSED, with prejudice.

R., pp. 93-94.

After wanting local case law, and then rejecting it, the ALS hearing officer said:

Officer Davis and the prosecutor agreeing to vacate [*sic*] the criminal proceeding is a separate matter and does not have any affect in the civil proceeding pursuant to Idaho Code § 18-8002A(7).

R., p. 135.

The ALS hearing officer abused his discretion and, among other things, was arbitrary and capricious in his analysis of this issue.

In *State v. Gusman*, 125 Idaho 805, 874 P.2d 1112 (1994), the Idaho Supreme Court, on a Petition for Review, was called upon to review the decision made by the Idaho Court of Appeals that involved the issue of res judicata and collateral estoppel in a DUI/refusal situation. The Defendant was arrested for DUI and an issue was raised about who was driving the car when the officer made the motor vehicle stop. The opinion indicates that the police officer believed that

²⁸*See, R.*, pp. 87-94.

the defendant switched seats with the passenger but ultimately Gusman was requested to submit to a breath test, which he refused. *See*, Idaho Code § 18-8002. Gusman requested a BAC hearing, under I.C. §18-8002 and Gusman was the only witness to testify. The trial court found that, based upon the testimony of Gusman, that Gusman was not driving at the time of the stop and dismissed the BAC refusal case.

During the DUI case, Gusman moved the court for a dismissal based upon the findings made at the BAC hearing relying upon collateral estoppel. That was denied by the trial court and Gusman entered a conditional guilty plea pursuant to I.C.R. 11 so he could appeal the matter.

The *Gusman* court discussed the differences between res judicata (claim preclusion) or collateral estoppel (issue preclusion) and noted that the doctrine of res judicata applies to actions between the same parties upon the same claim or demand. “[T]he former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit.” [Citations omitted.] *State v. Gusman*, 125 Idaho at 807.

Wilkinson submits that ITD is a “privity” to the State and the same claim, demand and issue was presented in both matters. In fact, contrary to the State’s effort in the BAC hearing in *Gusman*, in the ALS hearing, extensive testimony and evidence was presented to the ALS hearing officer. It may have been the situation in *Gusman* that the State did not vigorously prosecute the BAC Refusal hearing (since it did not call witnesses - *e.g.*, the arresting police officer) but in *Wilkinson* we have the flip side, where the State’s case was fully represented in not only the criminal case, but also the ALS case where the arresting officer testified and the video CD shows the noncompliance with the 15 MWP.

As further discussed in *Gusman*, collateral estoppel “works to prevent the relitigation of issues of ultimate fact.” *Id.* at 808. [Citations omitted.]

The five-factor test which must be considered by a court in determining whether collateral estoppel will act as a bar was set forth in *Gusman* and reads:

- (1) The party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue decided in the earlier case;
- (2) The issue decided in the prior litigation was identical to the issue presented in the present action;

(3) The issue sought to be precluded was actually decided in the prior litigation;

(4) There was a final judgment on the merits in the prior litigation; and

(5) The party against whom the issue is asserted was the party or in privity with the party in the prior litigation.

Id. at 808.

Running through those five factors it can quickly be seen that collateral estoppel should act as a bar in the ALS proceeding, and now before this Court on judicial review as a result of the proceedings that took place in the companion criminal case which resulted in the findings contained in the Order of Dismissal - that Wilkinson was not properly monitored and observed during the 15 MWP. The Parties had a full and fair opportunity to litigate the issue in the criminal case and the ALS case.

The Idaho Supreme Court ruled against *Gusman* because the Court found that the State did not have a full and fair opportunity to litigate the issue in the BAC Refusal case. Quite the opposite occurred in this case where Officer Davis and Hailey City Prosecutor Frederick Allington reviewed the CD in question, Petitioner's Exhibit M, and concluded and stipulated that Officer Davis did not properly observe and monitor Wilkinson prior to the time that she submitted to the breath test. This issue has not only been decided by the police officer, but also by the prosecuting attorney and an order was entered by a Blaine County Magistrate finding that the 15-minute observation period was violated by Officer Davis' failure to observe and monitor Wilkinson prior to the breath test.

The words that describe the ALS hearing officer's handling of this issue and his intransigence are clearly enumerated in I. C. § 67-5279(3): they are, quite simply, "arbitrary, capricious [and] an abuse of discretion." The ALS hearing officer's decision is also in violation of constitutional under the doctrines of *res judicata*, collateral estoppel and with respect to the statutory provisions, the ALS hearing officer failed to recognize a blatant violation of the Manual

and SOP.²⁹ In essence, the ALS hearing officer substituted his views, without any support in the record, for those of a certified operator of the Intox machine.

Based upon the foregoing, and, at a minimum, the doctrine of collateral estoppel, the decision in the criminal case should stand as a bar to a relitigation of the issue before the ALS hearing officer. The ALS Hearing Officer, in his first ALS Decision, complains that Wilkinson failed to point to any “local case law ... showing the method used ... violates the fifteen-minute observation period” and subsequently Wilkinson showed the hearing officer that it does violate 15 MWP: but he then rejects it saying that are different cases. That is arbitrary, capricious and an abuse of discretion.

The second ALS Decision sustaining Wilkinson’s suspension should be vacated and remanded with directions to vacate the driver’s license suspension or, as the district court did in *Ater v. Bureau of Occupational Licenses*, 144 Idaho 281, 160 P.3d 438, this Court can simply enter an order vacating the ALS suspension and not bother with a remand.

VI. THE ALS HEARING OFFICER ERRED BY FINDING THAT OFFICER DAVIS ADEQUATELY SATISFIED THE REQUIREMENTS OF OBSERVING AND MONITORING WILKINSON PRIOR TO THE BREATH TEST.

Again, considering I. C. § 67-5279, the ALS hearing officer’s conclusion that Officer Davis complied with the requirements of the 15-minute observation period were in violation of “statutory provisions” and “not supported by substantial evidence on the record as a whole” and were “arbitrary, capricious and an abuse of discretion.” On a cursory review of both ALS decisions, the hearing officer’s findings with respect to compliance with the 15 MWP easily supports a finding by this Court of an abuse of discretion and that they were arbitrary and not supported by substantial evidence on the record as a whole.

For example, compare the findings between the first decision and the second decision, R., pp. 35-47 and R., pp. 125-139. In particular, compare the section on R., p. 40 and R., p. 132

²⁹Administrative regulations are subject to the same principles of statutory construction as statutes. *Wheeler v. ITD, supra*. The “administrative regulations” have been established by the ISP through the Manual and SOP. *See*, IDAPA 11.03.01.013.03. Thus the Manual and SOP are construed as “statutes” for purposes of statutory construction under judicial review. *See also, In re Schroeder*, 147 Idaho at 479.

which is identified as “7. Was Wilkinson properly monitored prior to her breath test?” It is amazing, and disturbing to see, that the 21 findings of fact are exactly the same - they mirror each other. A number of findings in the second ALS Decision are not supported by the record. The ALS hearing officer may have added section 9 to his amended decision but, still, his 21 findings of fact contained in section 7 are the same in each opinion. If you look at both decisions, one would think that Officer Davis still did not appear and testify at the hearing on January 26, 2010.³⁰

The most blatant and outrageous findings are set forth in paragraphs 12-17 of section 7 recited in both decisions. *See, R.*, pp. 41-42; p. 133. They are:

13. An opportunity existed at this ALS hearing for Officer Davis to appear by subpoena as permitted by Idaho Code § 18-8002A(7).
14. Officer Davis’ appearance would clarify, explain, answer questions, and provide input on how he complied with ISP Forensic Services’ SOPs in monitoring Wilkinson prior to her evidentiary breath test.
15. Even though the subpoena was properly served and a phone number was provided to contact Officer Davis during the ALS hearing, shortly prior to Wilkinson’s ALS hearing a request was made in not having Officer Davis appear.
16. Wilkinson, attempting to interpret her provided evidence to meet her burden of proof is not sufficient to overcome Officer Davis’ standard (boiler point) language provided in Exhibit 3.
17. Furthermore, no local case law has been provided in showing the method used to observe drivers at the Blaine County jail where Officer Davis violates the 15-minute observation period.

As pointed out above, at the hearing on January 26, 2010 Officer Davis did have an opportunity to appear and explain and answer questions on whether “he complied with ISP Forensic Services SOPs in monitoring Wilkinson prior to her evidentiary breath test.” *See, R.*, p. 42 and 133, Finding of Fact, section 7, para. 14, p. 9.

³⁰*See*, the second ALS Decision, *R.*, p.125: “The reconsideration hearing came for hearing on January 26, 2010.” But the Tr., 1/26/2010 shows that Officer Davis was called as a witness.

To highlight Officer Davis' testimony at the ALS hearing on January 26, 2010, the following discussion clearly settles this issue:

Q. [by Elkins] Okay. And based on that, you and Mr. Allington agreed that the requirement that you monitor her [Wilkinson] closely during the 15-minute observation period had not been satisfied. Right?

A. That's correct.³¹

In an abuse of discretion and in an arbitrary and capricious fashion by making a finding not supported by substantial evidence on the record as a whole, the ALS hearing officer does not consider this testimony in his Amended Findings in section 9 of his decision dated February 11, 2010. *See, R.*, pp. 134-135.

On the other hand, the ALS hearing officer believes that even while Officer Davis had his back turned to Wilkinson "multiple times during the monitoring period" he was able to use other senses including, unbelievably, the "additional assistance from an echo in the room during the monitoring period." *See, R.*, p. 135.

Once the Court reviews Exhibit M and considers the pictures that were offered into the record before the ALS hearing officer, the Court will be able to appreciate the distance between Officer Davis, while he worked in the corner next to the Intox machine (*see, R.*, p. 63, Petitioner's Exhibit G) and where Wilkinson was seated on the bench as depicted in Petitioner's Exhibit H, *R.*, p. 64. As shown on Petitioner's Exhibit I, *R.*, p. 65, the distance from corner to corner is 18 feet and where Wilkinson was seated was approximately 15-16 feet from where Officer Davis was working at various times with his back turned to Wilkinson. These distances and factors are important when compared to other cases decided by the Idaho Appellate courts.

For a recent case that discusses judicial review of an ALS decision and the requirements of the 15 MWP and the monitoring period, *see, Bennett v. State, Department of Transportation*, 147 Idaho 141, 206 P.3d 505 (Ct. App. 2009) where the Court of Appeals affirmed Nez Perce County District Judge Brudie in vacating an ALS suspension for failure of the officer to properly monitor and observe the driver for 15 minutes prior to submitting to the test. Relying on *State v.*

³¹*See, Tr.*, 1/26/2010, p. 6, Ls. 1-5.

Carson, 133 Idaho at 453, 788 P.2d at 227, the *Bennett* court noted that “the monitoring period is required in order to rule on the possibility of alcohol or other substances have been introduced into the subject’s mouth from the outside or by belching or regurgitation. The level of surveillance must be such as could reasonably be expected to accomplish the purpose of the requirement.” 147 Idaho at 144. At the ALS hearing, Bennett testified that the police officer left room twice during the 15 MWP but the hearing officer, relying on the officer’s probable cause affidavit which contained “boiler point”³² language from a computer-generated form where the officer checked off that he followed proper procedures.

However, when specific, credible evidence demonstrates a violation of proper procedures, the affidavit alone is insufficient to support a finding that proper procedures were followed. Thus, the hearing officer’s finding that the breath test was conducted in compliance with procedural standards is not supported by substantial evidence in the record as a whole. Therefore, the district court did not err in vacating the hearing officer’s decision.

Bennett v. State, 147 Idaho at 145.

In reviewing all of the Idaho appellate cases that analyze this issue, it appears that the cases come down on whether the officer kept the suspect in his peripheral view and within 10 feet during the 15 MWP. For example, in *State v. Remsburg*, 126 Idaho 338, 882 P.2d 993 (Ct. App. 1994), the court held that the 15 MWP “must occur immediately prior to the administration of the test” and found that the officer satisfied the requirements of the SOP and Manual and did not require that the officer “unswervingly observed” or “stared fixedly” at the suspect. In *Remsburg*, the officer was seated next to the suspect and the officer testified that the “observed Remsburg” for the 15 MWP and that she did not burp, belch or vomit. However, in *State v. Utz*, 125 Idaho 127, 867 P.2d 1001 (Ct. App. 1993), the court held that where an officer had left the “area” where the suspect was being detained, such actions did not comply with the monitoring and observing requirements of the 15 MWP.

State v. Carson, 133 Idaho 451, 988 P.2d 225 (Ct. App. 1999) is instructive because that

³²See, R., p. 133, para. 16 where the *Wilkinson* ALS Hearing Officer places reliance, and refers to the language in the police officer’s probable cause affidavit, as “boiler point” whereas the *Bennett* court discounts statements contained in computer generated PC affidavits and disapproved of similar provisions.

is the case where the suspect was in the back seat of an ISP patrol car where the officer was trying to use that transport time as part of the 15 MWP. Even though the ISP trooper and Carson were in close proximity, the fact that the trooper did not keep Carson in his peripheral view is significant.

At the evidentiary hearing, the ISP officer testified that, in his opinion, he had conducted the necessary observation while transporting Carson to the Washington County facility even though Carson was placed in the back seat, passenger side of the police cruiser and turned on a light over the rear door so that Carson was illuminated. Carson's hands were also handcuffed behind his back (*i.e.*, Carson could not put anything in his mouth) and, supposedly, the ISP officer "intermittently observed Carson in the rear view mirror and listened for any indication of belching or regurgitation." *Id.* The ISP trooper acknowledged that during the drive from Payette County to Washington County rain was falling and the vehicle's windshield wipers were operating and he acknowledged that he wore a hearing aid in his left ear. In its holding, the *Carson* court noted:

It is apparent from the manual that the observation period is required in order to rule out the possibility that alcohol or other substances have been introduced into the subject's mouth from the outside or by belching or regurgitation. It is a precaution that is necessary to insure the validity of the test results. Although the observation requirement does not mandate that an officer "stare fixedly" at a test subject for the full fifteen-minute period, *Remsburg*, 126 Idaho at 340, 882 P.2d at 995, the level of surveillance must be such as could reasonably be expected to accomplish the purpose of the requirement.

In this case, during the trip to the Washington County Sheriff's office, Officer Miller's attention necessarily was devoted primarily to driving. He visually observed Carson only intermittently through glances at the rear-view mirror. Evidence presented at the motion hearing and common experience tell us that the officer's ability to use his hearing as a substitute for visual observation was impeded by noise from the automobile engine, tires on the road surface, rain and windshield wipers. There is also evidence that the officer's powers of aural observation were compromised by a hearing impairment. In our view, the State's foundational evidence did not demonstrate a mode of observation that would be likely to detect belching, regurgitation into the mouth, or the like. The circumstances of this case are not comparable to those presented in *Remsburg*, *supra*, where we held that an officer need not maintain constant visual contact with the subject for fifteen minutes.

Although in that case the officer's attention was occasionally diverted from the subject while he read an advisory form to her and programmed the test equipment, there was no evidence that other factors impeded the officer's ability to hear or smell. In the instant case, by contrast, the evidence shows that numerous sources of noise, the officer's hearing impairment, and his *position facing away from Carson*, would substantially impair his ability to supplement his visual observation with his other senses to insure that nothing occurred that would affect the validity of the test. Because the foundational requirements for admission of the breath test were not established in this case, the evidence should have been excluded. (Emphasis added.)

133 Idaho at 453.

See, also, State v. Charan, 132 Idaho 341, 971 P.2d 1165 (Ct. App. 1999) where the court made a point in the recitation of the facts that the operator of the Intox machine kept the suspect in his "peripheral" view while he got up to go about nine or ten feet away to do paperwork. *See, also, State v. Stump*, 146 Idaho 857, 203 P.3d 1256 (Ct. App. 2009), where the officer kept the defendant in his "direct or peripheral vision at all times" and was within eight to ten feet of the suspect and never left the room. Then, see *State v. Defranco*, 143 Idaho 335, 144 P.3d 40 (Ct. App. 2006) where 15 MWP was not satisfied where an ISP trooper briefly left the presence of a suspect to retrieve an item out of the trunk of his patrol car before having Defranco submit to a breath test on an Alco Sensor breath testing machine in his patrol car.

Against this backdrop, we turn to the present issue raised by Wilkinson. At the hearing on December 1, 2009 counsel for Wilkinson pointed out some of the deficiencies made apparent by the documents generated by the arresting officer. On Exhibit 2, R., p. 3 (the Intox print card) Officer Davis indicates that the "time first observed" was at 2:26 and the first breath test is noted at 2:39 which would be two minutes shy of the expiration of the 15-minute observation period. In his Probable Cause Affidavit, Exhibit 3, R., p. 5, Officer Davis states, in relevant part, that he transported Ms. Wilkinson to the Blaine County Jail and,

upon arrival I checked Rebecca's mouth for any foreign substances and began my waiting period at 0226 hours, according to my personal wristwatch. I played the ALS audio tape for Rebecca. After the ALS tape finished I asked Rebecca if she had any questions and she stated it was a lot of information to hear. I handed Rebecca the ALS form for her to read. I asked Rebecca if she wished to continue and she stated she would give a breath sample. At 0243 hours, according to my personal wristwatch,

Rebecca's BAC revealed .165 and .151. . . .

A couple of things stand out from the above quoted language: Officer Davis does not correlate his "personal wristwatch" to the clock on the Intox machine; he does not state that Rebecca submitted to the breath test after complying with the 15 MWP; he does not indicate that he closely observed or monitored Wilkinson during the 15 MWP nor does he indicate that she did not burp or belch, regurgitate or put anything in or take anything out of her mouth; he does not clearly delineate when the first breath test was obtained nor does he recognize the time difference between the first and second breath sample which, according to Exhibit 2, R., p. 3, the two samples are separated by a minute on the Intox clock. All he says is that at 0243 her breath test results revealed two numbers in excess of the legal limit. He could have said that he looked at his watch at 0255 or 06:30 hours and it would have provided the same information: The point is, when he looked at his wristwatch and states what the results were, it does not provide sufficient evidence that when he looked at his wristwatch, it complied with the 15 MWP.

A review of the CD is enlightening as to whether the officer complied with the 15 MWP and whether he monitored and observed Wilkinson. At 2:28:38³³ Ms. Wilkinson enters the Intox room with Officer Davis and he immediately starts playing the advisory CD (this is the CD that plays the information contained on Exhibit 1, R., p. 1). According to his Probable Cause Affidavit, Officer Davis started the 15 MWP *before* he started the advisory CD. Also, contrary to what Officer Davis states in his sworn affidavit, he does not check her mouth before starting the advisory CD (he does not check Ms. Wilkinson's mouth until approximately one minute after starting the CD) and, more importantly, he fails to advise her not to burp or belch or put anything in her mouth prior to submitting to the test.

At approximately 2:29:50 - over a minute after starting the advisory CD - Officer Davis decides to stop the CD and checks Ms. Wilkinson's mouth and asks her if she has anything in her mouth. He then starts the advisory CD where it was left off.

However, compliance with the 15 MWP was clearly violated at 2:30:05 when a female

³³These time stamp references are shown on the video, on the lower left hand of the screen, on the CD and will be used by counsel hereafter when making references to times on the CD.

jailer enters the Intox room and placed Ms. Wilkinson facing the padded wall in the corner near the end of the measuring tape as depicted in Petitioner's Exhibit H, R., p. 64. Wilkinson is asked to remove various personal items such as her shoes and jewelry and the female jailer pats her down while the advisory CD is playing. At this point, Ms. Wilkinson is facing away from Officer Davis and Officer Davis is facing away from Ms. Wilkinson.

At 2:30:35 Officer Davis stops the advisory CD while Ms. Wilkinson is being patted down with her face completely turned away from Officer Davis, and for that matter, the female jailer, while the CD is playing, Officer Davis is in the opposite corner tending to his paperwork and getting the Intox machine ready. Numerous times during these events, Officer Davis has his face turned completely away from Ms. Wilkinson. As shown in Petitioner's Exhibit I, R., p. 65 that distance is 18 feet and Petitioner's Exhibit G, R., p. 63, shows the approximate location where Officer Davis was tending to his paperwork.

At approximately 2:30:50 the female jailer removes the handcuffs from Ms. Wilkinson and after the female jailer leaves the Intox room, Ms. Wilkinson takes a seat at the bench and Officer Davis restarts the advisory CD at approximately 2:32:44. It is the Petitioner's belief that this time - 2:32:44 - is the earliest that the 15 minute observation period could have commenced with "monitor[ing]" and "observ[ing]". Certainly, it could not be argued that the 15 MWP was satisfied while Ms. Wilkinson was being patted down by the female jailer.

1. For 21 seconds, starting at 2:32:47, Officer Davis clearly has his head turned completely away from Ms. Wilkinson who is approximately 16 feet away. (See, views from Camera 14 and 16 on Exhibit M)

2. At 2:33:06 the slider door to the booking room slams shut.

3. For 16 seconds at 2:33:17, Officer Davis has his head turned away from Ms. Wilkinson.

4. At 2:33:35, for 30 seconds, Officer Davis is turned away from Ms. Wilkinson; further, during this time, at 2:33:45, Ms. Wilkinson has both hands by her mouth.

5. At 2:35:45 Officer Davis has his head completely turned away from Ms. Wilkinson for a couple of seconds and Ms. Wilkinson has her right hand next to her mouth and for the next two seconds it appears that her right hand is moving around her lips. At 2:35:50 it appears that Ms.

Wilkinson flicks something from her hand towards the floor.

6. At 2:36:37, 2:36:55, and 2:37:13 Officer Davis has his head completely turned away from Ms. Wilkinson for up to 15 seconds. Again, at 2:36:56 it appears that Ms. Wilkinson's right hand is next to her mouth.

7. At 2:38:06 it appears that Officer Davis is making a call on his radio - again with his head turned completely away from Ms. Wilkinson for approximately 25 seconds. It also seems to be a reasonably view of the evidence that Officer Davis had an ear piece (or ear phone) from his radio.

All totaled, Officer Davis is turned away from Ms. Wilkinson for approximately one minute and 49 seconds.

At approximately 2:38:55 the advisory CD is completed and Officer Davis asks Ms. Wilkinson if she has any questions and she responds by saying that it is a lot of information. Officer Davis then gives her the Notice of Suspension Advisory Form and at approximately 2:40:00 Ms. Wilkinson says that she wants to make a call. For the next four to five minutes there are numerous discussions between Ms. Wilkinson and Officer Davis about her desire to make a phone call and that she wants to discuss her situation with a lawyer. At one point, Ms. Wilkinson says that she is willing to pay the \$250 civil penalty and refuse the test. At 2:43:50 Ms. Wilkinson says that she wants to make a call "and find out what my rights are."

At 2:45:19 Ms. Wilkinson submits to the first breath test which is less than 15 minutes - by about 2 ½ minutes - after Officer Davis restarted the advisory CD at 2:32:44. Ms. Wilkinson's second sample is given at 2:46:05 which is also less than 15 minutes after the restart of the advisory CD by about a minute.

Once again at 2:54:08 Ms. Wilkinson asks Officer Davis if she can make a call. At 2:55:30 Ms. Wilkinson departs the Intox room and enters into the booking area at the Blaine County Sheriff's Department. At 2:55:44 the CD stops.

Wilkinson submits that based upon the video CD, Officer Davis did not properly observe and monitor her as required by the Manual and the SOP. The ALS suspension should be vacated.

VII. WILKINSON SHOULD BE AWARDED HER ATTORNEYS FEES

It is based on these circumstances that Wilkinson requests an award for her attorneys fees

incurred in this matter. When a review of the video CD is made, coupled with the testimony of Officer Davis where he states that he failed to properly monitor and observe Wilkinson 15 minutes prior to the breath test, then coupled with criminal court finding that the requirements of the Manual and SOP were not satisfied where Officer Davis failed “to properly observe and monitor the Defendant for 15 minutes prior to the time that she submitted to the breath test”³⁴ it seems apparent that the ALS Hearing Officer’s findings to the contrary are arbitrary, capricious and an abuse of discretion: in other words under IRCP 54(e) they are frivolous and without foundation. This case cries out for an award of attorney’s fees.

But the standard for an award of attorneys fees in this case is not frivolous and without foundation: Wilkinson just has to show under I.C. § 12-117(1) that she is the prevailing party and that “the party against whom the judgment is rendered acted without a reasonable basis in fact or law.” That has been shown here.

Consider *Ater v. Idaho Bureau of Occupational Licenses*, 144 Idaho 281, 160 P.3d 438 (2007) where the Idaho Supreme Court awarded attorney’s fees to the petitioner before the district court on judicial review.

Idaho Code §12-117(1) is intended: “1) to serve as a deterrent to groundless or arbitrary agency action; and 2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies never should hav[ve] made.” *In re Est. of Kaminsky*, 141 Idaho 435, 439-40, 111 P.3d 121, 124-5 (2005) [other citation omitted].

Ater, 144 Idaho at 286.

It is submitted that the ALS Hearing Section needs to be deterred from making groundless and arbitrary decisions and Wilkinson should not have to bear the unfair financial burden by incurring unnecessary attorney’s fees to litigate this matter. Wilkinson is entitled to an award of attorney’s fees.

³⁴R., p. 93

DATED this 27 day of April, 2010.


BRIAN E. ELKINS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27 day of April, 2010 I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

<input checked="" type="checkbox"/> Mailed	Timothy J. Stover
<input type="checkbox"/> Hand-Delivered	Special Deputy Attorney General
<input type="checkbox"/> Faxed to 208-736-9929	Idaho Transportation Department
<input type="checkbox"/> Faxed and mailed	P. O. Box 5226
	Twin Falls, ID 83303-5226


BRIAN E. ELKINS

crim\wilkinson-JudRev-brief.brf

INTOXILYZER 5000

OPERATOR'S TRAINING MANUAL

Idaho Department of Law Enforcement
Idaho State Police
Forensic Services
August 1, 1999
(March, 2007)

EXHIBIT A-1

255

FIFTEEN MINUTE WAITING PERIOD

The mucous lining of the mouth cavity and nasal passages stores alcohol for some time after a person consumes alcohol. Normal body processes eliminate residual mouth alcohol within 15 minutes.

Monitor the subject for 15 minutes. During this time, the subject may not smoke, consume alcohol, eat, belch, vomit, use chewing tobacco, or have gum or candy in the mouth. If belching or vomiting does occur or something is found in the mouth, have it removed and wait an additional 15 minutes.

OPERATING PROCEDURE FOR A BREATH TEST:

Observe subject for 15 minutes.

The subject should not drink, smoke or use **any** type of oral medication during this time.

Insert a new mouthpiece in the end of the BREATH TUBE.

To conduct a breath test, push the green START TEST button and respond to the displayed messages and commands.

REFUSAL: If the subject refuses to provide a sample during the test sequence wait until the message "**PLEASE BLOW/R**" is displayed and then press the green **START TEST** button. After the message "**PLEASE BLOW/R**" is displayed the instrument will automatically printout a refusal if a sample is not obtained within (3) three minutes.

The print card will show:

SUBJECT TEST REFUSED

TIME

SUBJECT REFUSED TO CONTINUE

<u>TEST SEQUENCE</u>	<u>DISPLAY READS</u>	<u>REQUIRED OPERATOR ACTION</u>
1. Push Green Start Button	"INSERT CARD" (flashing)	Insert an evidence card into the card slot located on the front panel of the instrument
2. Question series for Idaho	See question series on page 15	Answer each question and press the return/enter button to save the information
3. Air blank	"AIR BLANK", displayed then scrolls through the time (TIME HR:MIN ZONE), the date (DATE MM/DD/YY), and then displays the result of the air blank (AIR BLANK, ##) where ## is the alcohol concentration obtained during the air blank.	No action needed

DISPLAYED MESSAGE

"INVALID TEST -
INSTRUMENT RANGE EXCEEDED"

"INVALID TEST -
CHECK AMBIENT CONDITIONS"

"INVALID SAMPLE"

"INHIBITED - RFI"

CORRECTIVE OPERATOR ACTION

The concentration of the sample exceeded the range of the instrument set at 0.600 BrAC. This usually occurs from strong mouth alcohol such as breath spray or mouth wash. However, this message may also indicate that there is a problem with the instrument. You may opt to perform another subject test, or find another method of obtaining a sample (see page 27).

The instrument detected a substance in its surroundings that may interfere with the breath test. Try to perform another breath test. If you obtain this message again find another method to obtain a sample and inform your Breath Testing Specialist.

The instrument detected residual mouth alcohol in the subject's breath sample. The instrument completes the mode sequence, prints "INVALID SAMPLE.XX" in place of "SUBJECT TEST .##", and returns to the beginning of the mode sequence. Print card also shows "REPEAT OBSERVATION PERIOD BEFORE RETESTING SUBJECT". Observe the subject for at least 15 minutes before beginning another breath analysis.

High level radio frequency interference is present. The instrument halts the test, prints "INHIBITED RFI"; "INVALID TEST" and prepares itself to start another test.

Locate the RFI source and either remove the source from the instrument's operational environment or move the instrument to a new environment free from RFI.



Standard Operating Procedure

Breath Alcohol Testing

Idaho State Police
Forensic Services
August 1994
Revised 7/7/2009

3. Subject Testing Procedure

Proper testing procedure by certified operators is necessary in order to provide accurate results that will be admissible in court. Instruments used in Idaho measure alcohol in the breath, not the blood, and report results as grams of alcohol in 210 liters of breath.

3.1 Prior to evidential breath alcohol testing, the subject must be monitored for fifteen (15) minutes. Any material which absorbs/adsorbs or traps alcohol should be removed from the mouth prior to the start of the 15 minute waiting period. During the monitoring period the subject should not be allowed to smoke, drink, eat, or belch/burp.

3.1.2 The breath test must be administered by an operator currently certified in the use of the specific model of instrument used.

3.1.3 False teeth, partial plates, or bridges installed or prescribed by a dentist or physician does not need to be removed to obtain a valid test.

3.1.4 The operator may elect a blood test in place of the breath alcohol test if there is a failure to complete the fifteen minute monitoring period successfully.

3.1.5 During the monitoring period, the operator must be alert for any event that might influence the accuracy of the breath test.

3.1.5.1 The operator must be aware of the possible presence of mouth alcohol as indicated by the testing instrument. If mouth alcohol is suspected or indicated, the operator should begin another 15-minute waiting period before repeating the testing sequence.

3.1.5.2 If, during the 15-minute waiting period, the subject vomits or is otherwise suspected of regurgitating material from the stomach, the 15-minute waiting period must begin again.

3.2 A breath alcohol test includes two (2) valid breath samples taken during the testing sequence and separated by air blanks.

NOTE: A deficient or insufficient sample does not automatically invalidate a test.

3.2.1 If the subject fails or refuses to provide a second or third adequate sample as requested by the operator, the single test result may be considered valid.

3.2.2.1 The operator may repeat the testing sequence as required by circumstances.

3.2.2.2 The operator should use a **new mouthpiece** for each series of tests.

3.2.3 A **third breath sample** is required if the first two results differ by more than 0.02.

- 3.2.3.1 Unless mouth alcohol is indicated or suspected, it is **not** necessary to repeat the 15-minute waiting period to obtain a third breath sample.
- 3.2.4 The operator should log test results and retain printouts for possible use in court. If there is no printout, the log page becomes the legal record of the test results.
- 3.2.5 If a subject fails or refuses to provide a second or third sample as requested by the operator, the results obtained are still considered valid by the ISPFS, **provided** the failure to supply the requested samples was the fault of the subject and not the operator.
- 3.2.6 If the second or third samples are lacking due to instrument failure, the operator should attempt to utilize another instrument or have blood drawn.

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I.

STATEMENT OF THE CASE

A. Nature of the Case.

This case began with the filing of a Petition for Judicial Review ("Petition") by Petitioner Rebecca S. Wilkinson ("Petitioner"). Petitioner requests review of Administrative Hearing Examiner Eric Moody's ("Hearing Officer") *Amended Findings of Fact and Conclusions of Law and Order*, dated February 11, 2010 (the "Decision"), which sustained the Notice of Suspension for Failure of Evidentiary Testing, dated October 11, 2009 ("Notice of Suspension").

B. Course of Proceedings.

Petitioner has adequately set forth the procedural history of this matter in her brief. In the interest of judicial economy, Respondent hereby incorporates said procedural history by reference.

C. Statement of Facts.

Petitioner has adequately set forth the underlying facts of this matter in her brief, and Respondent will not reiterate the same in full. By way of supplementation, Officer Garth Davis's ("Officer Davis") testimony was that "the 15-minute observation period had been satisfied. What hadn't been satisfied was the fact that I had my back turned to her multiple times." Hrg. Transc. 5:15--17 (Jan. 26, 2010).

II.

STANDARD OF REVIEW

The Idaho Administrative Procedures Act (IDAPA) governs the review of department decisions to deny, cancel, suspend, disqualify, revoke or restrict a person's driver's license. *See* Idaho Code §§ 49-201, 49-330, 67-5201(2), 67-5270; *see also, In re Suspension of Driver's License of Gibbar*, 143 Idaho 937, 941, 155 P.3d 1176, 1180 (Ct. App. 2006). A court may overturn an

agency's decision only when the agency's findings, inferences, conclusions, or decisions: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3). The party challenging the agency decision must demonstrate that the agency erred in a manner specified in Idaho Code § 67-5279(3) and that a substantial right of that party has been prejudiced. *Price v. Payette County Bd. of County Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998); *See also, In re Driver's License Suspension of Marshall*, 137 Idaho 337, 340, 48 P.3d 666, 669 (Ct. App. 2002).

When acting in its appellate capacity under IDAPA, the district court must defer to the agency's findings of fact unless such findings are clearly erroneous. *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. The agency's factual determinations are binding on the district court, and the court may not substitute its judgment for that of the agency as to the weight of the evidence presented, even where there is conflicting evidence before the agency, so long as the agency's determinations are supported by substantial competent evidence in the record. Idaho Code § 67-5279(1); *Gibbar*, 143 Idaho at 941, 155 P.3d at 1180; *Urrutia v. Blaine County, ex rel. Bd. of Comm'rs*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000); *Marshall* at 340, 48 P.3d at 669.

III.

LAW AND ARGUMENT

Pursuant to Idaho Code section 18-8002A, the Hearing Officer shall not vacate the Suspension unless he finds, by a preponderance of the evidence, that:

- (a) The peace officer did not have legal cause to stop the person; or
- (b) The officer did not have legal cause to believe the person had been driving or was in actual physical control of a vehicle while under the influence of alcohol, drugs or other

intoxicating substances in violation of the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code; or

(c) The test results did not show an alcohol concentration or the presence of drugs or other intoxicating substances in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code; or

(d) The tests for alcohol concentration, drugs or other intoxicating substances administered at the direction of the peace officer were not conducted in accordance with the requirements of section 18-8004(4), Idaho Code, or the testing equipment was not functioning properly when the test was administered; or

(e) The person was not informed of the consequences of submitting to evidentiary testing as required in subsection (2) of [section 18-8002A].

Idaho Code § 18-8002A. As the person requesting the hearing, Petitioner bore the burden of proving these propositions. *Id.*

Petitioner submits two arguments for the Court's consideration: 1) the doctrine of collateral estoppel precludes Respondent from relitigating the issue of whether Officer Davis properly observed Petitioner for the required fifteen-minute waiting period prior to evidentiary testing; and 2) the Hearing Officer erred in finding that Officer Davis properly observed Petitioner for the required fifteen-minute waiting period.¹ As explained further below, Petitioner's arguments fail because the doctrine of collateral estoppel is inapplicable to this matter and because substantial and competent evidence support the Hearing Officer's determination that Officer Davis properly observed Petitioner as required.

A. Petitioner has failed to prove the required elements of collateral estoppel.

Petitioner asserts that collateral estoppel precludes relitigation of the issue of whether Officer Davis complied with the observation requirement. To prevail on this argument, Petitioner must prove each of the following five elements:

¹ Although Petitioner enumerated additional issues for review in her Petition, she did not present any argument or authority relative to said issues in her brief. Accordingly, Petitioner has waived any and all arguments pertaining to these issues. *See Hall v. Farmers Alliance Mut. Ins. Co.*, 145 Idaho 313, 323, 179 P.3d 276, 286 (2008) (holding that issues on

(1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

Ticor Title Co. v. Stanion, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007). If Petitioner fails to prove any of these five factors, the Court cannot apply collateral estoppel as a bar to litigation. *See State v. Gusman*, 125 Idaho 805, 874 P.2d 1112 (1994). Because Petitioner has failed to establish all of the required elements of collateral estoppel, the doctrine is inapplicable in this case.

1. Because Petitioner and the county prosecutor stipulated to the motion to suppress, the issue of whether Officer Davis satisfied the observation requirement was not actually decided by the court in the criminal proceeding.

Petitioner bases her argument for the application of collateral estoppel in this case on the Stipulation and corresponding Order entered in the criminal proceeding. However, a review of the Order indicates that the court in the criminal action did not make any findings concerning whether Officer Davis satisfied the observation requirement. *See R*, pp. 93–94. Rather, the court’s Order was based solely upon the Stipulation. *See id.*

The Idaho Supreme Court has stated that it is hesitant to hold “that an issue resolved by stipulation has been litigated or determined for purposes of collateral estoppel.” *Rajspic v. Nationwide Mut. Ins. Co.*, 104 Idaho 662, 665, 662 P.2d 534, 537 (1983). This reluctance to grant a stipulation preclusive effect is, no doubt, based in part on the fact that

[t]here are many reasons why a party may choose not to raise an issue, or to contest an assertion, in a particular action. The action may involve so small an amount that

appeal that are not supported by law or authority are deemed waived).

litigation of the issue may cost more than the value of the lawsuit. Or the forum may be an inconvenient one in which to produce the necessary evidence or in which to litigate at all. The interests of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party are less compelling when the issue on which preclusion is sought has not actually been litigated before. And if preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation.

Robertson Supply, Inc. v. Nicholls, 131 Idaho 99, 103, 952 P.2d 914, 918 (Ct. App. 1998) (quoting Restatement (Second) of Judgments § 27 comment e (1982)). Accordingly, a stipulation is binding in a subsequent action between the parties only if the parties have manifested an intention to that effect.” Restatement (Second) of Judgments § 27 comment e (1982).

The record contains no direct evidence that indicates precisely why the county prosecutor entered into the Stipulation. Presumably, the prosecutor was concerned regarding his ability to prove beyond a reasonable doubt that the observation requirement had been satisfied.² Nevertheless, the prosecutor’s reservations or his legal analysis concerning the observation requirement do not amount to an actual decision on the issue. Moreover, the Stipulation contains no indication that the county prosecutor intended it to bind Respondent in the ALS proceeding. Accordingly, the Stipulation does not satisfy the third element necessary for collateral estoppel. Therefore, the Suspension should be affirmed.

2. Respondent was not a party and was not in privity with a party to the criminal proceeding, and, therefore, did not have a full and fair opportunity to litigate the observation requirement issue.

A governmental agency, such as Respondent, charged with the enforcement and administration of license suspensions for failure of evidentiary testing is not the same party as the plaintiff in a

² As discussed further, below, the different burdens of proof is, in itself, reason not to accord the Stipulation preclusive effect.

criminal prosecution for any crimes arising out of the same facts.³ *See State v. Brabson*, 976 S.W.2d 182, 184 (Tex. Crim. App. 1998). Indeed, the respective functions and responsibilities of the various state agencies are so distinct that applying collateral estoppel would interfere with the proper allocation of authority between them. *See State v. Lemmer*, 736 N.W.2d 650, 663 (Minn. 2007). Therefore, although Petitioner was prosecuted by the State of Idaho, by and through the county prosecutor,⁴ Respondent had no authority to participate in such action, had no authority to control such action, and was not a party to that action. Similarly, the county prosecutor has no authority to act on behalf of Respondent with regard to administrative license suspensions, that authority having been expressly given solely to the attorney general. *See Idaho Code* § 67-1401.

Respondent also was not in privity with the State of Idaho, as sovereign, relative to the criminal proceeding. “‘Privity’ is defined as the ‘connection or relationship between two parties, each having a legally recognized interest in the same subject matter.’” *Schwan's Sales Enterprises, Inc. v. Idaho Transp. Dept.*, 142 Idaho 826, 832, 136 P.3d 297, 303 (2006) (quoting Black’s Law Dictionary 1217 (7th ed. 1999)). Whether privity exists is not simply a matter of relationship, but whether the party against whom the doctrine of collateral estoppel is asserted had its legal rights litigated in the prior action. *Id.* Therefore, to establish privity, Petitioner must show that Respondent derived its interests from a party to the criminal proceeding, namely the State of Idaho. *State, Bureau of Child Support v. Knowles*, 128 Idaho 835, 838, 919 P.2d 1036, 1039 (Ct. App. 1996).

Respondent’s rights do not derive from the criminal prosecution of crimes arising from facts

³ It should also be noted that while Petitioner argues that Respondent is a “privity” to the State, Petitioner does not argue that Respondent and the State are the same party. Pet’r’s Br., p. 11.

⁴ The county prosecutor is authorized to prosecute violations for state misdemeanors and infractions and violations of county or city ordinances committed within the municipal limits of that city when the arresting or charging officer is a city employee. *Idaho Code* § 31-2604.

pertaining to an administrative license suspension, but rather arise directly from section 18-8002A.

The Legislature emphasized this distinction between the criminal prosecution and the administrative proceeding by stating,

The facts as found by the hearing officer shall be independent of the determination of the same or similar facts in the adjudication of any criminal charges arising out of the same occurrence. The disposition of those criminal charges shall not affect the suspension required to be imposed under the provisions of this section.

Idaho Code § 18-8002A (emphasis added).

Petitioner has offered no argument explaining how Respondent was a party to the criminal proceeding, but instead merely submits the cursory and conclusory statement that “ITD is a ‘privy to the State’” Pet’r’s Br., p. 11. Petitioner cites to *State v. Gusman*, 125 Idaho 805, 874 P.2d 1112 (1994) (“*Gusman I*”) as the principle authority for her collateral estoppel argument and, presumably, for her privity argument. However, in *Gusman II*, the defendant refused to submit to evidentiary testing and subsequently requested a hearing to show cause why she refused to submit to the evidentiary test. *Gusman II*, 125 Idaho at 806, 874 P.2d at 1113. This distinction between refusing evidentiary testing and failing evidentiary testing is significant because the show cause hearing that may be requested in connection with a refusal is conducted before the court. The county prosecutor represents the State at such hearing, and Respondent is not a party to such proceeding.

Accordingly, while the same parties may have been parties to both proceedings in *Gusman II*, Respondent was not a party or privy to a party to the criminal prosecution relative to this matter, which arose from Petitioner’s failure, rather than refusal, of evidentiary testing. Therefore, Petitioner has failed to establish the required elements of collateral estoppel.

3. The different burdens of proof preclude collateral estoppel acting as a bar in this action.

Even when all of the required elements of collateral estoppel have been established, application

of the doctrine does not necessarily follow. “[T]he principles of collateral estoppel and the other principles of res judicata are not to be applied in the abstract; they have validity only if their application will carry out the policy which these principles were designed to express.” *State v. Gusman*, 125 Idaho 810, 813, 874 P.2d 1117, 1120 (Ct. App. 1993) (“*Gusman I*”) (quoting *Griffin v. City of Roseburg*, 255 Or. 103, 464 P.2d 691, 693 (1970)) (brackets in original). Particularly relevant to this matter is the principle set forth in the Restatement, which provides,

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

* * *

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action

Restatement (Second) of Judgments § 28 (1982) (emphasis added).

In the criminal proceeding, the State of Idaho bore the burden of persuasion. Specifically, the State was required to prove all elements of the crime beyond a reasonable doubt. In contrast, at the administrative proceeding, Petitioner bore the burden of proof and was required to prove one of the five enumerated factors by a preponderance of the evidence. Idaho Code § 18-8002A. This shift of the burden of persuasion strongly weighs against the application of collateral estoppel in this matter.

B. By virtue of Idaho Code section 18-8002A(7), the Legislature has expressed a policy that discourages the application of the doctrine of collateral estoppel in the context of an ALS proceeding and an attending criminal proceeding.

Assuming the Court finds that each of the five elements set forth above has been met, the doctrine of collateral estoppel should not be applied in this case because “to do so would undermine the legislative purpose and effect of the existing statutory scheme.” *Gusman I*, 125 Idaho 810, 813, 874

P.2d 1117, 1120 (Ct. App. 1993) (holding that collateral estoppel did not bar relitigation in the criminal proceeding of issues determined in connection with the civil license suspension). If application of the principle of collateral estoppel “would likely frustrate the legislative purpose and intent” behind a statute, the Court should decline to apply said principle. *Id.*

With regard to administrative license suspensions, the Legislature has expressly stated that the facts found in connection with and the disposition of any criminal prosecution shall not have any bearing on the suspension hearing, and vice versa. Specifically, the Legislature stated,

The facts as found by the hearing officer shall be independent of the determination of the same or similar facts in the adjudication of any criminal charges arising out of the same occurrence. The disposition of those criminal charges shall not affect the suspension required to be imposed under the provisions of this section.

Idaho Code § 18-8002A(7) (emphasis added). Although the doctrine of collateral estoppel is not implicated by name, this language strongly indicates a policy that the two proceedings remain entirely independent of one another and that the courts not give preclusive effect to the findings and disposition of either the civil suspension proceeding or the criminal proceeding. Accordingly, the dismissal of the criminal charges against Petitioner has no bearing on and is irrelevant to the Suspension.

C. The fifteen-minute observation requirement is satisfied when a law enforcement officer is continually in position to use his senses to “observe” the subject.

Petitioner argues that to satisfy the observation requirement, the officer must “ke[ep] the suspect in his peripheral view and within 10 feet during the 15 MWP.” This proposition, however, contradicts established Idaho case law. *See Bennett v. State, Dept. of Transp.*, 147 Idaho 141, 206 P.3d 505 (Ct. App. 2009). In *Bennett*, the Idaho Court of Appeals reiterated that

the monitoring period is required in order to rule out the possibility that alcohol or other substances have been introduced into the subject’s mouth from the outside or by belching or regurgitation. The level of surveillance must be such as could reasonably be expected to accomplish the purpose of the requirement. In light of the purposes of the requirement, “observation” can include not only visual observation

but use of other senses as well. So long as the officer is continually in position to use his senses, not just sight, to determine that the defendant did not belch, burp or vomit during the observation period, the observation complies with the training manual instructions. In this regard, the officer need not “stare fixedly” at the subject for the entire observation period. The fifteen-minute monitoring period is not an onerous burden and “[t]his foundational standard ordinarily will be met if the officer stays in close physical proximity to the test subject so that the officer’s senses of sight, smell and hearing can be employed.”

Id. at 144, 206 P.3d 508 (internal citations omitted) (emphasis added). Thus, the observation requirement in this case was satisfied if the Hearing Officer found that Officer Davis stayed in close proximity to Petitioner so that his senses of sight, smell, and hearing could be employed.

D. The Hearing Officer’s finding that Officer Davis complied with the fifteen-minute observation requirement is supported by substantial evidence.

In light of the above, Petitioner’s argument is merely a request that the Court review the Hearing Officer’s determination of an issue of fact. The task of weighing evidence is left to the sound discretion of the Hearing Officer. “[The reviewing] Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. Rather [the] Court defers to the agency’s findings of fact unless they are clearly erroneous.” *Lane Ranch Partnership v. City of Sun Valley*, 144 Idaho 584, 588, 166 P.3d 374, 378 (2007) (citation omitted).

The Court of Appeals has indicated that an agency’s findings are not “clearly erroneous” if they are supported by “substantial evidence.” See *Pearl v. Board of Professional Discipline of the Idaho State Board of Medicine*, 137 Idaho 107, 111, 44 P.3d 1162, 1166 (2002).

The agency’s findings must be affirmed unless the findings are not supported by substantial evidence on the record as a whole or the findings are arbitrary, capricious or an abuse of discretion. Substantial evidence is more than a scintilla of proof, but less than a preponderance. It is relevant evidence that a reasonable mind might accept to support a conclusion.

Id. at 111–12, 44 P.3d at 1166–67 (citations omitted).

“[T]he agency’s factual determinations are binding on the reviewing court, even where there is

conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record.” *Wheeler v. Idaho Transp. Dept.*, 148 Idaho 378, 223 P.3d 761, 765 (Ct. App. 2009). Indeed, it is not necessary that the evidence in the record be uncontroverted nor is it required that the evidence lead to an absolute or certain conclusion. *See Spencer v. Kootenai County*, 145 Idaho 448, 456, 180 P.3d 487, 495 (2008). To qualify as substantial and competent, “[the evidence] need only be of sufficient quantity and probative value that reasonable minds could reach the same conclusion as the fact finder.” *Id.*

With regard to Petitioner’s contention that Petitioner was not properly observed during the fifteen-minute waiting period, Petitioner concedes, “It is clear that Officer Davis was in the same room with Wilkinson for 15 minutes” Pet’r’s Br., p. 9. The Hearing Officer found, “The DVD strongly shows Officer Davis having the capability in using other sensory methods during the observation period that would have detected the possibility of any actions by Wilkinson introducing any foreign matter during the observation period,” and that “Officer Davis had the capability of using other senses to monitor Wilkinson, including, but not limited to, an additional assistance from an echo in the room during the monitoring period.”⁵ R, pp. 133, 135. The Hearing Officer also found that “Wilkinson failed to submit any proof that the female jailer could not have properly observed Wilkinson and informed Officer Davis of any irregularities occurring when the jailer was patting down Wilkinson.” *Id.* at p. 132. There is substantial and competent evidence in the record, including the photographs and DVD, to support the Hearing Officer’s findings. Therefore, the Court should affirm the suspension of Petitioner’s driving privileges.

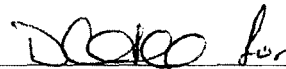
⁵ The Hearing Officer evidently recognized Officer Davis’s testimony concerning whether he had monitored Petitioner closely enough during the waiting period as a conclusion of law, which is not binding upon the Court or, by extension, the

IV.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests the Court affirm the Hearing Officer's decision to sustain the suspension of Petitioner's driving privileges.

DATED this 25th day of May, 2010.




Timothy J. Stover

CERTIFICATE OF SERVICE

The undersigned certifies that on the 25th day of May, 2010, he caused a true and correct copy of the foregoing instrument to be served upon the following persons in the following manner:

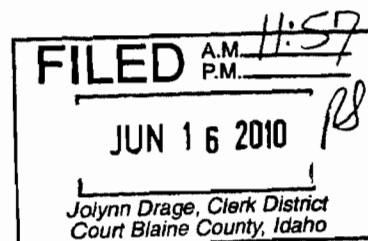
Brian E. Elkins
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Attorney for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT COURT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

REBECCA S. WILKINSON,)	
	)	Case No. CV-10-123
Petitioner,)	
v.	)	PETITIONER'S REPLY BRIEF
)	
STATE OF IDAHO, DEPARTMENT)	
OF TRANSPORTATION,)	
)	
Respondent.)	
)	

I. INTRODUCTION

The above named Petitioner, Rebecca Susan Wilkinson ("Wilkinson"), through her attorney, Brian E. Elkins, submits this memorandum in response to the Respondent's Brief dated May 25, 2010.

A. WHAT THE RESPONDENT FAILED TO ADDRESS

There are a number of arguments and points that were raised by Wilkinson in her Petitioner's Brief¹ that were not addressed by the Respondent, State of Idaho, Department of Transportation (ITD):

¹When referring to "Petitioner's Brief," Wilkinson is referring to her opening brief, dated April 27, 2010.

- (1) ITD appears to agree with Wilkinson with respect to the standards and requirements for an operator to properly observe and monitor a suspect during the 15 MWP. ITD offers no other case authority for a different position on what it takes for an operator to comply with the 15 MWP except to cite *Bennett v. ITD*, 147 Idaho 141, 206 P.3d 505 (Ct.App. 2009)² for the idea that Officer Davis could also use his sense of smell and hearing while approximately 15 feet away from Wilkinson, with his back turned to her, while talking on his radio. ITD fails to discuss the impact of *State v. DeFranco*, 143 Idaho 335, 144 P.3d 40 (Ct.App. 2006) and *State v. Carson*, 133 Idaho 451, 988 P.2d 1001 (Ct.App. 1993) in its argument that an operator of the Intox machine may rely the senses of smell and hearing.
- (2) ITD does not present a contrary argument, or take issue with, Wilkinson's comparison of the ALS hearing officer's first and second ALS Decisions. Nor does ITD comment on the ALS hearing officer's erroneous Findings of Fact and Conclusions of Law in his second ALS Decision set forth at R., p. 133, para. 13-17.
- (3) ITD does not take issue with, nor comment on, Wilkinson's highlights of the events that transpired on the video CD, Petitioner's Exhibit M, starting at page 19 of the Petitioner's Brief detailing the various times when Officer Davis had his head completely turned away from Wilkinson, the relevant distances involved and, most importantly, when Officer Davis was making a call on his radio during the 15 MWP at 2:38:06 on the video CD.
- (4) ITD does not present an argument against Wilkinson's request for attorney's fees.

B. WILKINSON'S RESPONSE TO WHAT THE ITD DOES ARGUE

While apparently ignoring a number of arguments that were raised by Wilkinson, ITD seeks to summarize Wilkinson's brief by saying:

²Wilkinson also cited *Bennett* in her opening brief.

Petitioner submits two arguments for the Court's consideration: (1) the doctrine of collateral estoppel precludes Respondent from relitigating the issue of whether Officer Davis properly observed Petitioner for the required 15-minute waiting period prior to evidentiary testing; and (2) the hearing officer erred in finding that Officer Davis properly observed Petitioner for the required 15-minute waiting period.

See, Respondent's Brief, p. 3

After this quote, ITD drops a footnote and argues that Wilkinson listed other issues for review in her Petition for Judicial Review but does not present any argument nor authority relative to those issues. However, see the Petitioner's Brief for her "Issues on Judicial Review" that raise those issues contemplated by I.C. §67-5279(3) which in turn focus on the arguments of collateral estoppel and the issues concerning the 15 MWP requirements to "observe" and "monitor" the suspect. The only issue Wilkinson did not raise in Petitioner's Brief concerns the one listed in paragraph 16(c), p. 5, in the Petition for Judicial Review. That potential issue concerned the failure of Officer Davis to allow Wilkinson to call a lawyer, after her request to do so, in violation of *State v. Carr*, 128 Idaho 181.

All of the other issues are raised throughout the Petitioner's Brief. For example, Wilkinson argued that the ALS hearing officer violated statutory provisions when he failed to adhere to the requirements of the Manual and SOP when considering whether under I. C. § 18-8002A(d), the ALS suspension should have been vacated. Also Wilkinson argued that the ALS hearing officer exceeded his statutory authority by failing to consider the evidence presented in the record and, specifically, the testimony of Officer Garth Davis where he testified that he did not comply with the requirements of monitoring and observing Wilkinson during the 15 MWP. Also, as pointed out by Wilkinson in her opening brief, Wilkinson submitted argument that the ALS hearing officer rendered findings that were made upon unlawful procedure when a comparison is made between the ALS hearing officer's First and Second Decisions and made findings that are not supported in the record. Finally, at numerous times, Wilkinson argued that the ALS hearing officer's findings were arbitrary, capricious or an abuse of discretion. *See*, Petition for Judicial Review, para. 16, p. 5 and Petitioner's Additional Issue on Judicial Review dated March 2, 2010.

C. COLLATERAL ESTOPPEL.

ITD argues that the doctrine of collateral estoppel should not apply because the "... order indicates that the court in the criminal action did not make any findings concerning whether Officer Davis satisfied the observation requirement."³ However, both the Stipulation and Order of Dismissal makes specific reference to a finding that Wilkinson's breath test results would be "suppressed from evidence for failure of operator, Garth Davis, to observe and monitor the defendant the requisite 15 minutes before she submitted to the breath test." R., p. 91. In the Order of Dismissal it provides that:

IT IS HEREBY ORDERED that the Defendant's breath test results for alcohol concentration be suppressed from evidence for failure of the arresting officer/operator of the Intoxilyzer 5000 breath testing machine, to properly observe and monitor the Defendant for 15 minutes prior to the time that she submitted to the breath test.

R., p. 93.

Based upon the above, there is a finding by the Court that Officer Davis failed to properly observe and monitor Wilkinson prior to the time that she took the breath test. ITD's argument on this point fails.

Also, the block quote by ITD relying on *Robertson Supply, Inc. v. Nicholls*, 131 Idaho 99, 103, 952 P.2d 914, 918 (Ct. App. 1998) listing reasons why a stipulation should not be granted preclusive effect does not apply, at all, to the circumstances presented in this case and the DUI case.

ITD also argues in its brief that, "[t]he record contains no direct evidence that indicates precisely why the county prosecutor entered into the Stipulation." See, Respondent's Brief, p. 5. Again, quite to the contrary, the record is crystal clear why the city prosecutor⁴ decided to suppress the breath test results where the Stipulation provides:

... the breath test results obtained from the Defendant on October 11, 2009

³See, Respondent's Brief, p. 4, Ls. 15-16.

⁴A number of times in Respondent's Brief, ITD refers to the prosecutor as the "county prosecutor" but, just for the record, Mr. Allington is the misdemeanor city prosecutor and is not connected with the Blaine County Prosecuting Attorney's office.

through an Intoxilyzer 5000EN machine, SN 68-013466, shall be suppressed from evidence *for failure of operator, Garth Davis, to observe and monitor the Defendant the requisite 15 minutes before she submitted to the test.* Said requisite 15-minute observation period is required in the Standard Operating Procedures and Operator's Manual for the Intoxilyzer 5000 and has also been mandated by Idaho case law.

Whereupon the State moved to dismiss the case, and there being no objection from the Defendant, the Motion to Dismiss was granted by the Court. (Emphasis added.)

See, R., pp. 91-92.

Not sure what more is needed to indicate "precisely why the county prosecutor entered into the Stipulation." Also, the "direct evidence" was based upon the city prosecutor's review of the video CD, Petitioner's Exhibit M.

Next, ITD speculates in that portion of its brief that the prosecutor may have been concerned about "his ability to prove beyond a reasonable doubt that the observation requirement had been satisfied." ITD confuses the different levels of proof at a suppression/motion *in limine* hearing *vis-a-vis* a trial to determine the defendant's guilt. The foundational predicate to be laid for the admissibility of a breath test result is not proof beyond a reasonable doubt. But it is proof to a preponderance of the evidence and is the same level of proof that is required by the petitioner in an ALS hearing when asserting that, under I. C. § 18-8002A(7)(d) that the test is not conducted in accordance with the SOP and Manual for the particular breath test device.

As the Court of Appeals said in *State v. Utz*, 125 Idaho 127, 867 P.2d 1001 (Ct. App. 1993) the foundational requisites to admitting breath test results "is a preliminary question of admissibility to be decided by the Court." That procedure is permitted, pretrial, pursuant to I.R.E. 104(a).

More on point, in *State v. Mazzuca*, 132 Idaho 868, 979 P.2d 1226 (Ct. App. 1999), the defendant filed a pretrial motion *in limine* contesting the defendant's breath test results which concerned deficient samples.

In this case, Mazzuca's motion *in limine* challenged the reliability of the test and placed the foundational element at issue. Therefore, the magistrate was called upon to determine whether there was *sufficient* foundational showing of the accuracy of the testing procedure to allow admission of the test results.

Therefore, under the cited authority, we conclude the magistrate properly denied the motion *in limine*, finding that *Mazzuca had failed to prove the state would be unable to lay proper foundation for the breath test results at trial. The magistrate's denial of Mazzuca's motion in limine is therefore affirmed.* (Emphasis added.)

132 Idaho at 870-871.

Clearly, this language used by the Court of Appeals in *Utz* and *Mazzuca* does not require the State to prove beyond a reasonable doubt, the foundational prerequisite for the admissibility of a breath test result. In *Mazzuca*, the opinion even suggests that the burden of proof was on the defendant to show that the State “would be unable to lay proper foundation for the breath test results at trial.” *Id.* at 871. When the Court uses words such as “sufficient” and “adequate foundation” Wilkinson maintains that the burden is to a preponderance of the evidence and if the Court of Appeals required a more stringent standard, then words such as clear and convincing or proof beyond a reasonable doubt would have replaced sufficient and adequate proof. Accordingly, ITD’s argument on this point fails.

Continuing on, ITD argues that the Plaintiff, State of Idaho, in the criminal action is not the same as the “State of Idaho, Department of Transportation” captioned above as the Respondent. Because of this, ITD argues, collateral estoppel should not apply. This effort to distinguish between the State is of no consequence. The “State,” in the DUI case and in the ALS matter, is seeking to suspend Wilkinson’s driving privileges through, the same title and chapter of Idaho Code Section 18-8002A and 18-8005 (1).

From a practical standpoint, this is especially true when we step back and look at the ALS hearing officer’s findings in his first ALS Decision, and then incorrectly in his second ALS Decision, for chiding Wilkinson in failing to show that “[n]o local case law has been provided in showing the method used to observe drivers at the Blaine County Jail or Officer Davis violates the 15-minute observation period.” *See*, Finding 17, second ALS Decision, R., 133. It should be quite obvious that the party who has the greatest “full and fair opportunity to litigate” the issue in the earlier case was the city prosecutor on behalf of the State. At an ALS hearing, ITD is not represented by counsel and the “State” does not even participate in the hearing except through the ALS hearing officer who is employed by ITD. It seems, at least to Wilkinson, that the ALS

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hearing officer was “capricious” in his observation pointing out that there was no local case law, and then once local case law is offered to show that compliance was not satisfied, the ALS hearing officer ignored it.

The majority of ITD’s brief is devoted to the issue of collateral estoppel which is an easy way for this Court on judicial review to vacate the suspension. However, from a factual standpoint, Wilkinson’s strongest argument is based upon the record and the proceedings that took place in the Intox room 15 minutes prior to the time that Wilkinson submitted to the test as documented in the video CD.

D. THE 15 MWP

In that regard, ITD makes the beguiling argument that this Court should not overrule the ALS hearing officer’s findings as the Court should not substitute its judgment for that of the agency. But a simple review of the ALS hearing officer’s first and second ALS Decisions show that his findings are clearly erroneous and, in particular, the second ALS Decision is quite oblivious to the fact that Officer Davis submitted testimony. The hearing officer’s findings in the second ALS Decision are clearly contrary to the evidence.

It is important to recognize that ALS hearing officers work for ITD and are simply hearing examiners. They are not lawyers, nor judges, and there would be no meaning to judicial review if this Court gave them carte blanche power to make factual findings that could not be examined by this Court on judicial review. The ALS hearing officer’s findings are indeed “clearly erroneous” and they are not supported by “substantial evidence.” His findings are clearly erroneous because the operator of the breath testing machine, Officer Garth Davis, testified that he did not properly monitor and observe Wilkinson by turning his back to her numerous times throughout the 15 MWP. Added to that, when at 2:38:06, Petitioner’s Exhibit M, Officer Davis appears to make a call on his radio with his head turned completely away from Wilkinson for approximately 25 seconds. The ALS Hearing Officer substituted his judgment for that of the trained operator of the Intox machine.

Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Byington*, 132 Idaho 589 , 977 P.2d 203,207 (1999) (quoting *Bullard v. Sun Valley Aviation, Inc.*, 128 Idaho 430, 432, 914 P.2d 564 566(1996)).

Based upon that definition, the ALS Hearing Officer did not use substantial evidence to find that Officer Davis properly observed and monitored Wilkinson. A reasonable mind would not accept as adequate to support a conclusion that the 15 MWP was satisfied because, contrary to Officer Davis's own opinion, he had the "additional assistance from an echo in the room during the monitoring period." R., p. 135.

This situation where Officer Davis had his back turned to Wilkinson while talking on his radio, is analogous to those circumstances examined by the Court of Appeals in *State v. Carson*, 133 Idaho 451, 988 P.2d 225 (Ct. App. 1999) and *State v. Defranco*, 143 Idaho 335, 144 P.3d 40 (Ct. App. 2006), neither of which are discussed by ITD nor cited in its Brief.

Defranco is enlightening because in that case, during the 15 MWP, the Idaho State Trooper was conducting a breath test on Defranco in his patrol car by means of an mobile Alco Sensor III. Defranco challenged the 15 MWP compliance based upon the fact that the ISP trooper left the area by the rear passenger door, where Defranco was seated during the 15 MWP, and went to the trunk of the patrol car to retrieve and find an NOS Advisory Form. The ISP officer testified that he only left Defranco's side for 10-15 seconds and affirmatively testified that if Defranco had belched or coughed loudly during this time, he would have heard it. However, the ISP officer's testimony was clearly rejected and Judge Lansing, writing for the Court, found that the 15 MWP requirements were not satisfied. In Footnote 2 the Court noted: "Stemm [the ISP Trooper] testified that it was his memory that it took 10-15 seconds. The audio portion of the video tape, commencing with the sound of papers being shuffled and ending with the shutting of the trunk lid, shows that more than one minute elapsed." *Id.* at 338. An important nuance of the *Defranco* decision is that the appellate reviewing court did not blindly defer to the trial court's findings but, implicitly, found that the officer's testimony was not credible and that the magistrate's findings were clearly erroneous.

Here, as in *Carson*, the officer was not always in a physical position to use either his sight or, alternatively, his senses of smell and hearing, to accomplish the purpose of the monitoring period. While Stemm was rummaging in the trunk [footnote omitted] of the patrol car, even when peering under the trunk lid at Defranco, Stemm's visual observation was impeded by the fact that Defranco was *facing away from him*. During this period of time at the rear of the car, Stemm could not have heard or smelled a belch or regurgitation because of the trunk lid and the rear window

separating the men and the sound of the cruiser's running engine. Therefore, we hold that Defranco was not "monitored" in such a manner as to accomplish the purpose of pre-test monitoring, as described in the training manual.

* * *

The 15-minute monitoring period is not an onerous burden, and it is "a precaution that is necessary to ensure the validity of the test results." [*Id.*, *Carson*] This foundational standard ordinarily will be met if the officer stays in close proximity to the test subject so that the officer's senses of sight, smell and hearing can be employed. If an officer deviates from that practice, without beginning the 15-minute period anew, which is always an alternative in cases of uncertainty, the officer risks that the breath test results will be rendered inadmissible. Such is the result here.

Id. at 338.

Such is the result in the *Wilkinson* case. Coupled with Officer Davis' own opinion that he did not comply with the "monitoring" requirement that he was at various times 15 feet away from Wilkinson with his back turned to her, while talking on his radio, with an ear bud in one of his ears while other "echos" are occurring in the room from the NOS advisory CD, doors slamming, the ALS hearing officer's decision is "clearly erroneous" and should be vacated.

E. CONCLUSION

Based upon I. C. § 67-5279(3), Wilkinson submits that the ALS hearing officer violated statutory provisions, exceeded his statutory authority, rendered findings that were made upon unlawful procedure, rendered findings that were not supported by substantial evidence in the record, and that his findings were arbitrary, capricious and an abuse of discretion. It is based on these circumstances, that not only Wilkinson respectfully urges this Court to vacate her ALS driver's license suspension, but also that the circumstances justify, and clearly warrant, an award of attorney's fees. Wilkinson requests an award based upon the rationale and holding of *Ater v. Idaho Bureau of Occupational Licenses*, 144 Idaho 281, 160 P.3d 438 (2007). These proceedings by ITD have been "groundless" and are sufficient to provide Wilkinson "a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies never should have made. See, *Ater v. Idaho Bureau of Occupational Licenses*, 144 Idaho at 286.

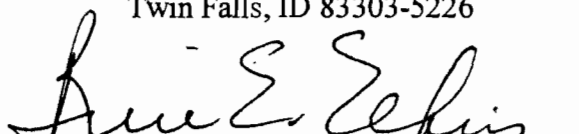
DATED this 15 day of June, 2010.


BRIAN E. ELKINS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15 day of June, 2010 I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

<input checked="" type="checkbox"/> Mailed	Timothy J. Stover
<input type="checkbox"/> Hand-Delivered	Special Deputy Attorney General
<input type="checkbox"/> Faxed to 208-736-9929	Idaho Transportation Department
<input type="checkbox"/> Faxed and mailed	P. O. Box 5226
	Twin Falls, ID 83303-5226


BRIAN E. ELKINS

crim\wilkinson-JudRev-replybrief.brf

COURT MINUTES

CV-2010-0000123

Rebecca S Wilkinson vs. State Of Idaho Department Of Transportation

Hearing type: Judicial Review

Hearing date: 11/1/2010

Time: 1:57 pm

Judge: Robert J. Elgee

Courtroom: District Courtroom

Court reporter: Susan Israel

Minutes Clerk: Crystal Rigby

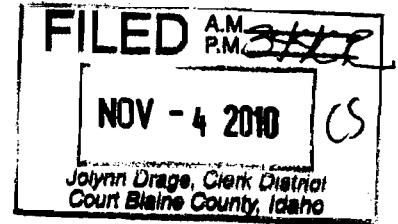
Tape Number: District

Party: Rebecca Wilkinson, Attorney: Brian Elkins

Party: State Of Idaho Department Of Transportation, Attorney: Timothy Stover

Counter #	
2.01	Counsel and Ms. Wilkinson present.
	Court introduces the case, has reviewed the briefs.
	Mr. Elkins inquires if the Court has reviewed the video.
2.02	Court responds, did not review the video, it is not this courts duty to review the evidence.
2.03	Mr. Elkins believes the question is a question of law rather than fact.
2.05	Court comments about a decision on whether the foundational prerequisite is made.
	Mr. Elkins responds. Discusses that the officer did not comply with the manual and the SOP in re: 15 minute waiting period.
2.24	Court inquires about free review to see if there was compliance.

	Mr. Elkins agrees and continues, discusses the award of attorney's fees in this case.
2.32	Mr. Stover responds.
2.35	Court comments about the dismissal of the criminal case binding the Transportation Departments ALS suspension. There is no need to argue collateral estoppel or res judicata.
2.42	Mr. Stover continues, discusses the ALS officer's decision. Reviews the right to claim attorney's fees in regard to a petition for judicial review.
2.49	Court comments about the statute regarding attorney's fees.
	Mr. Elkins responds.
2.55	Court reviews cases offered by counsel. Court can not find that the hearing officer's decision was erroneous.
3.07	Mr. Elkins responds, and inquires about a decision without reviewing the entire record.
3.08	Court responds. Court upholds the hearing officer's determinations.
	Mr. Stover will prepare and order.
3.11	Recess



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

* * * * *

REBECCA SUSAN WILKINSON,

Petitioner,

v.

STATE OF IDAHO, DEPARTMENT OF
TRANSPORTATION,

Respondent.

Case No. CV 2010-0000123

**ORDER ON PETITION FOR
JUDICIAL REVIEW**

This matter came before this Court for oral argument on Petitioner's Petition for Judicial Review on November 1, 2010. Petitioner, Rebecca Susan Wilkinson, was represented by Brian E. Elkins; Respondent, the Idaho Department of Transportation, was represented by Timothy J. Stover, appointed as Special Deputy Attorney General. Good cause appearing therefore, this Court Orders as follows:

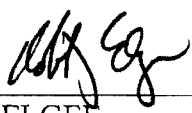
The findings in this matter shall be as reflected in the record and the transcript of oral argument heard on November 1, 2010.

It is hereby ORDERED, ADJUDGED and DECREED that the Order of the Hearing Officer sustaining the driver's license suspension of Rebecca Susan Wilkinson is hereby AFFIRMED and Petitioner's Petition for Judicial Review is DENIED.

It is further ORDERED, ADJUDGED and DECREED that the Order Maintaining Stay on License Suspension shall expire and be of no further force and effect after forty-two (42) days have

passed from the date of this Order. However, in the event the Petitioner timely files an appeal, then the Order Maintaining Stay on License Suspension filed in this matter on March 15, 2010, shall remain in effect, during the pendency of such appeal, as permitted by Idaho Appellate Rule 13(b)(14).

DATED this 4 day of November, 2010.



ROBERT J. ELGEE
District Judge

CLERK'S CERTIFICATE OF SERVICE

The undersigned certifies that on the 4 day of November, 2010, she caused a true and correct copy of the foregoing **ORDER ON PETITION FOR JUDICIAL REVIEW** to be served upon the following persons in the following manner:

Brian E. Elkins
ATTORNEY AT LAW
P.O. Box 766
Ketchum, ID 83340

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
(208) 726-9328

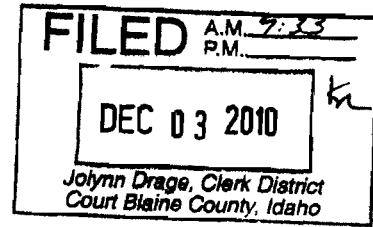
Timothy J. Stover
WORST, FITZGERALD & STOVER, PLLC
P.O. Box 5226
Twin Falls, ID 83303-5226

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
(208) 736-9929

CLERK OF THE COURT

By: 

Deputy Clerk



ORIGINAL

BRIAN E. ELKINS, P.C.
Attorney at Law
120 East Avenue North
P. O. Box 766
Ketchum, Idaho 83340
Telephone (208) 726-4338
Facsimile (208) 726-9328
Email: beelkins@cox.net

Attorney for Petitioner/Appellant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT COURT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

REBECCA S. WILKINSON,)	
	)	Case No. CV-10-123
Petitioner/Appellant,)	
	)	NOTICE OF APPEAL
v.)	
	)	Filing Fee: \$86.00
STATE OF IDAHO, DEPARTMENT	)	Fee Category: IAR 23(a)(1)
OF TRANSPORTATION,)	
)	
Respondent.)	
)	

TO: The Respondent, State of Idaho, Idaho Transportation Department, and its attorney,
Timothy J. Stover, Special Deputy Attorney General

Blaine County Clerk of the Court

NOTICE IS HEREBY GIVEN THAT:

1. Under Idaho Appellate Rule ("IAR") 17, the above named Appellant, Rebecca S. Wilkinson, appeals against the above named Respondent to the Idaho Supreme

Court from the *Order on Petition for Judicial Review* filed November 4, 2010, the Honorable Robert J. Elgee, District Judge, presiding.

2. That the Appellant has a right to appeal to the Idaho Supreme Court, and the order described in paragraph (1) above is an appealable order pursuant to IAR 11(f).
3. A preliminary statement of the issues on appeal which the Appellant intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the Appellant from asserting other issues on appeal.
 - (a) Whether the district court erred in affirming the Hearing Officer's¹ decision sustaining the driver's license suspension of the Appellant and denying her Petition for Judicial Review;
 - (b) Whether the district court erred when it failed to review the entire record, viz., Petitioner's Exhibit M, a DVD/CD video of the relevant 15 minutes before the Petitioner submitted to a breath test to determine alcohol concentration;
 - (c) Whether the district court erred when it denied the Appellant's request for attorney's fees and costs.
4. Has an order been entered sealing all or any portion of the record? If so, what portion?

Response: *See*, Order Redacting Agency Record, filed April 22, 2010, striking pages 69, 71 and 73 from the Agency Record.
5.
 - (a) Is a Reporter's Transcript requested?

Response: Yes.
 - (b) The Appellant requests the preparation of the following portions of the Reporter's Transcript: counsels' arguments to the district court and the district court's comments, colloquies, and decision from the bench that occurred at the hearing in this matter on November 1, 2010.
6. The Appellant requests a standard record pursuant to IAR 28 (b), plus the briefs that were filed before the district court, plus all exhibits contained in the record

¹ The Petition for Judicial Review involved a review of an administrative hearing concerning the suspension of the Appellant's driving privileges pursuant to Idaho Code §18-8002A(7) and the "Hearing Officer" that considered the matter is defined in I.C. §18-8002A(1)(f).

before the district court that were submitted to the ALS Hearing Officer.

7. In addition, and as specified in IAR 17(j), the Appellant request that all exhibits that were submitted to the ALS Hearing Officer, and part of the record before the district court, be sent to the Supreme Court.

8. I certify:

(a) That a copy of this Notice of Appeal has been served on the reporter of whom a transcript has been requested as named below at the address set out below.

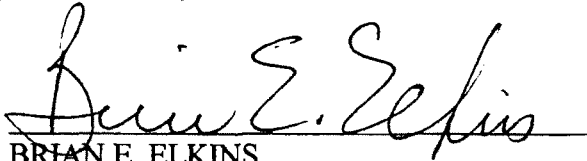
(b) (1) The Clerk of the District Court has been paid the estimated fee for preparation of the Reporter's Transcript in the amount of \$200.

(2) The requested down payment for preparation of the Clerk's record has been paid in the amount of \$100; the Clerk has estimated that the cost for the record on appeal will be \$583.75.

(c) Under IAR 23(a)(1), the filing fee is \$86.00 and will be paid by counsel for the Appellant at time of filing the Notice of Appeal.

(d) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 1 day of December, 2010.



BRIAN E. ELKINS

ATTORNEY FOR APPELLANT REBECCA S. WILKINSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1 day of December, 2010, I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

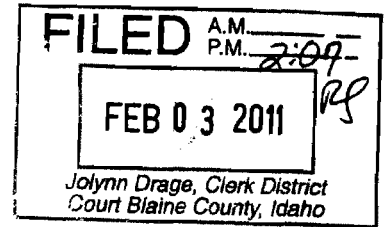
☒ Mailed
☐ Hand-Delivered
☐ Faxed to 208-736-9929
☐ Faxed to 208-736-9929
and mailed

Timothy J. Stover
Special Deputy Attorney General
Idaho Transportation Department
746 N. College Rd., Suite 200
P. O. Box 5226
Twin Falls, ID 83303-5226

☒ Mailed
☐ Hand-Delivered
☐ Faxed to _____
☐ Faxed to _____
and mailed

Susan Israel
Blaine County Court Reporter
P. O. Box 1379
Ketchum, ID 83340


BRIAN E. ELKINS



BRIAN E. ELKINS, P.C.
Attorney at Law
120 East Avenue North
P. O. Box 766
Ketchum, Idaho 83340
Telephone (208) 726-4338
Facsimile (208) 726-9328
E-mail: beelkins@cox.net
ISB No. 3150

Attorney for Petitioner/Appellant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT COURT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

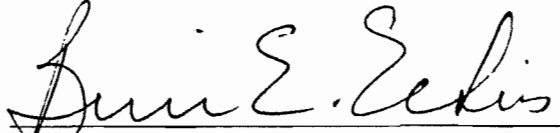
REBECCA S. WILKINSON,)	
	)	Case No. CV-10-123
Petitioner/Appellant,)	
v.	)	Supreme Court No.: 38335
)	
STATE OF IDAHO, DEPARTMENT	)	APPELLANT'S OBJECTIONS TO
OF TRANSPORTATION,	)	THE RECORD ON APPEAL
)	
Respondent.)	
_____)	

The Appellant, Rebecca S. Wilkinson, by and through her attorney of record moves this Court pursuant to Idaho Appellate Rule 29(a) for the following:

1. That the case heading be corrected from Rebecca S. Wilkinson, Plaintiff/Appellant to Rebecca S. Wilkinson Petitioner/Appellant.
2. That pages 123, 125, and 127 be deleted from the record consistent with the prior Order Correcting Agency Record entered by the District Court on April 22, 2010 where it ordered that the three (3) pages in question "be redacted and stricken from the agency record." See Order Correcting Agency Record, R., pp. 230-231.

This objection is based upon the entire file and records in this matter. Oral Argument is requested.

DATED this 2 day of February, 2011.



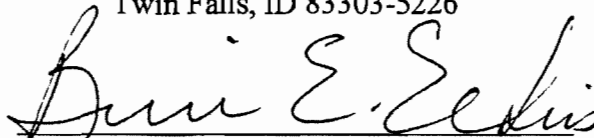
BRIAN E. ELKINS

Attorney for Petitioner/Appellant

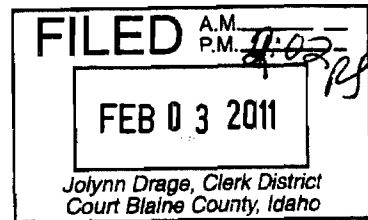
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2 day of February, 2011, I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

<input checked="" type="checkbox"/> Mailed	Timothy J. Stover
<input type="checkbox"/> Hand-Delivered	Special Deputy Attorney General
<input type="checkbox"/> Faxed to 208-736-9929	Idaho Transportation Department
<input type="checkbox"/> Faxed and mailed	P. O. Box 5226
	Twin Falls, ID 83303-5226


BRIAN E. ELKINS

crimwilkinson-OBJ2RECORD ON APPEAL.wpd



ORIGINAL IN RED

BRIAN E. ELKINS, P.C.
Attorney at Law
120 East Avenue North
P. O. Box 766
Ketchum, Idaho 83340
Telephone (208) 726-4338
Facsimile (208) 726-9328
E-mail: beelkins@cox.net
ISB No. 3150

Attorney for Petitioner/Appellant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT COURT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

REBECCA S. WILKINSON,)	
	)	Case No. CV-10-123
Petitioner/Appellant,	)	Supreme Court No.: 38335
v.)	
	)	NOTICE OF HEARING RE:
STATE OF IDAHO, DEPARTMENT	)	APPELLANT'S OBJECTIONS TO
OF TRANSPORTATION,	)	THE RECORD ON APPEAL
)	
Respondent.)	
)	

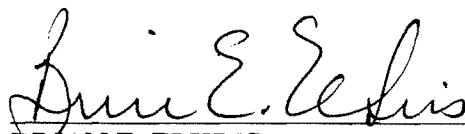
PLEASE TAKE NOTICE that Appellant's Objections to the Record on Appeal will be called up for hearing as follows:

Date: Monday, February 14, 2011.

Time: 11:30 p.m.

Place: District Courtroom, Douglas Kramer Judicial Building, Hailey, Idaho.

DATED this 1 day of February, 2011.

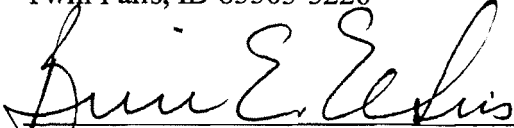

BRIAN E. ELKINS
Attorney for Petitioner/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2 day of February, 2011, I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

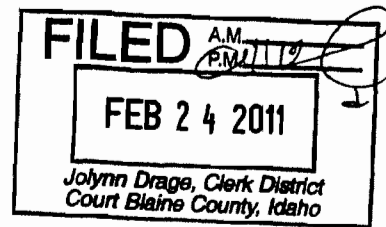
☒ Mailed
☐ Hand-Delivered
☐ Faxed to 208-736-9929
☐ Faxed and mailed

Timothy J. Stover
Special Deputy Attorney General
Idaho Transportation Department
P. O. Box 5226
Twin Falls, ID 83303-5226


BRIAN E. ELKINS

crimwilkinson-NOTICE OF HEARING APP OBJwpd.wpd

BRIAN E. ELKINS, P.C.
Attorney at Law
120 East Avenue North
P. O. Box 766
Ketchum, Idaho 83340
Telephone (208) 726-4338
Facsimile (208) 726-9328
E-mail: beelkins@cox.net
ISB No. 3150



ORIGINAL IN RED

Attorney for Petitioner/Appellant

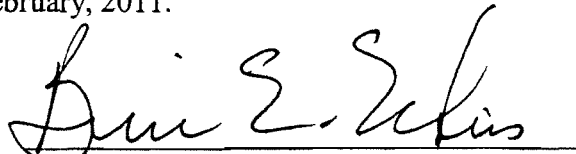
IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT COURT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

REBECCA S. WILKINSON,)	
	)	Case No. CV-10-123
Petitioner/Appellant,)	
v.	)	Supreme Court No.: 38335
)	
STATE OF IDAHO, DEPARTMENT	)	STIPULATION TO CORRECT
OF TRANSPORTATION,	)	THE RECORD ON APPEAL
	)	AND ORDER
Respondent.)	
)	

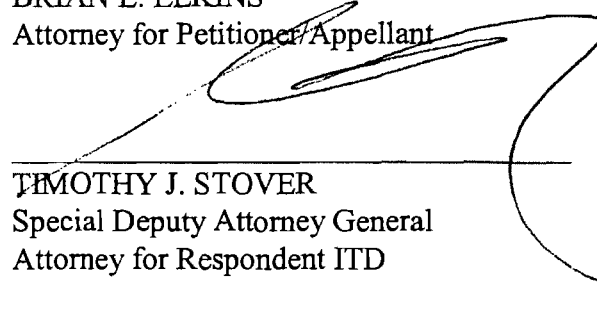
The Appellant, Rebecca S. Wilkinson, by and through her attorney of record, Brian E. Elkins hereby stipulates and agrees with Timothy J. Stover, Special Deputy Attorney General, and attorney for the Respondent Idaho Transportation Department, that the record on appeal be changed as follows:

1. That the case heading be corrected from Rebecca S. Wilkinson, Plaintiff/Appellant to Rebecca S. Wilkinson Petitioner/Appellant.
2. That pages 123, 125, and 127 be deleted and stricken from the Record on Appeal.

DATED this 7th day of February, 2011.



BRIAN E. ELKINS
Attorney for Petitioner/Appellant



TIMOTHY J. STOVER
Special Deputy Attorney General
Attorney for Respondent ITD

ORDER

Based upon the forgoing Stipulation and good cause appearing therefore;

IT IS HEREBY ORDERED that the clerk of the court is directed to change the case heading to list Rebecca S. Wilkinson as Petitioner/Appellant instead of Plaintiff/Appellant; furthermore, the Clerk is directed to delete pages 123, 125, and 127 from the Record on Appeal.

2/16/11



ROBERT J. ELGEE
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24 day of February, 2011, I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

☒ Mailed
☐ Hand-Delivered
☐ Faxed to 208-736-9929
☐ Faxed and mailed

Timothy J. Stover
Special Deputy Attorney General
Idaho Transportation Department
P. O. Box 5226
Twin Falls, ID 83303-5226

☒ Mailed
☐ Hand-Delivered
☐ Faxed to 208- 726-9328
☐ Faxed and mailed

Brian E. Elkins
P.O. Box 766
Ketchum, ID 83340

✓ Supreme Court



CLERK OF THE COURT

EXHIBIT LIST

EXHIBITS SUBMITTED BY THE CLERK:

*Copy of Petitioner's Exhibit M- CD-R from December 1, 2009.

*Transcript of Administrative License Suspension Hearing held on December 1, 2009.

*Transcript of Administrative License Suspension Hearing held on January 26, 2010.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

REBECCA S. WILKINSON,	)	Supreme Court No. 38335
)	
Petitioner/Appellant,)	
	)	CLERK'S CERTIFICATE
vs.)	
)	
STATE OF IDAHO, DEPARTMENT OF)	
TRANSPORTATION,)	
)	
Respondent.)	
<hr/>		

STATE OF IDAHO)
) ss.
County of Blaine)

I, Andrea Logan, Deputy Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine, do hereby certify that the above and foregoing Record in the above-entitled cause was compiled and bound under my direction and is a true, full and correct Record of, the pleadings and documents under Rule 28 of the Idaho Appellate Rules.

I do further certify that all documents, x-rays, charts and pictures offered or admitted in the above-entitled cause will be duly lodged with the Clerk of the Supreme Court along with the Court Reporter's Transcript and Clerk's Record, as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Hailey, Idaho, this 13 day of January, 2011.

JOLYNN DRAGE, Clerk of the Court

By 
Andrea Logan, Deputy Clerk

